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NATIONAL SECURITY, UN CHARTER AND USE OF FORCE: RULES AND PERSPECTIVES UNDER INTERNATIONAL LAW

Dr. Santosh K. Upadhyay*

Abstract: The contemporary scenario and demands of national security is very much diversified and manifest altogether different levels of concerns. The traditional theoretical approaches of responding to the erstwhile security concerns would hardly be fit, in their dogmatic pursuance, to alleviate the states' concerns of national security. The States' national security concerns touch almost all aspect of national life including trade, economic, environment, democratic ideals including its most basic manifestation in the form of the use of force by armed forces or non-state actors. The UN Charter serve as the basic yardstick to determine the legality or illegality of States' actions involving the use of force or threat to use force. The paper analyses the scope and contents of the UN Charter provisions with respect to the use of force and discusses some contestable categories like humanitarian intervention, protection of nationals abroad and self-defence against terrorism. It finally concludes that in light of some recent incidents it appears that the right to self-defence against terrorists beyond the national borders of victim state, with some restrictive conditions, is getting acceptance by the states. The paper also discusses the avenues available to the states to use UN bodies like General Assembly, Security Council and the International Court of Justice to serve their nuanced national security interests.

Key Words: UN Charter, National Security, Use of Force, Self-Defence, Terrorism.

Introduction:

National Security is a term of many nuanced meanings and approaches. It touches almost all aspects of nation's life. In this time of rapidly changing geo-political considerations and use of technology, states' national security needs become more inclusive and diversified. It includes, but not restricted to, the security of citizens, territory, resources and assets both within territory and abroad, ideologies, institutions and interests etc. All these are the essential components and concerns of national security of any state. Each and every state has freedom to take measures to defend and advance its national security's concerns to an extent that these measures do not violate the principles of international law. Many international legal regulatory mechanisms like of trade, environment, sea and investment etc. permit states even to take exceptional measures on the grounds of national security.

The UN Charter is the most basic among all these international legal regulatory mechanisms. It recognizes the principles of sovereign equality and laid down broader inspirational goals and framework of international cooperation. The UN Charter though merely a constitutive treaty of the United Nations Organization but it is more than a mere treaty and there are many pointers to this claim. First, the historical contexts and purposes for which the Charter came into effect make it special event in the history of international relations. Second, the stipulation under article 103 that obligations undertaken by member states under the Charter would prevail over their conflicting obligations under any other international agreement makes this Charter special and reiterates its overarching legal reach. Article 2(6) of the Charter also indicates towards this overarching character when it authorizes the UN to ensure compliance with the principles of international peace and security even by non-member states. Third, it provides for the most overarching and fundamental international regulatory mechanism towards maintenance of international peace and security and prohibition on the use or threat to use force. The maintenance of international peace and security and the criteria for

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use of force and self-defence are the important aspects of any considerations of national security. Thus it would be pertinent to discuss the UN Charter provisions vis-à-vis these national security's needs and aspirations of states. This paper is a modest attempt towards this end.

The paper is divided into four parts. Part I broadly discusses the powers and functions of the UN General Assembly and the Security Council that have important bearings on the national security. Part II briefly engages with the Charter's principles of prohibitions of use or threat to use force, self-defence and collective self-defence. This part also discusses the relevant customary principles of international law on the topic. Part III of the paper highlights some debates related to the issues of use of force and self-defence. And Part IV concludes the study.

Part I
UNGA, UNSC and National Security

The maintenance of international peace and security is sine qua non for any state's national security considerations. The UN Security Council has the primary responsibility for the maintenance of international peace and security. It has power to determine the acts of aggression or breach or threat to breach of the international peace and security and can adopt resolutions resulting into binding obligations upon the states.[1] Before making any final determinations in the matters of threat to the international peace and security, it can also call upon the parties concerned to comply with such provisional measures as it deems fit.[2] After the determination of the situation as acts of aggression or breach of peace or threat to breach of peace, the Security Council may adopt both military and non-military measures to ameliorate the situation.[3] It can also constitute its own subsidiaries organs to help it perform its functions in better ways.[4] The Security Council has undertaken even the administration of the territories under its powers to maintain international peace and security.[5]

The Security Council functions continuously and representatives of each of its member states always present at its seat.[6] All the non-procedural decisions of the Security Council are taken by 9 consenting votes including the concurrent votes of the five permanent members.[7] The historical practices of the Council show that absence of any permanent member from the voting would not affect the decision and only the active negative voting generally called veto would stall the particular decision.[8]

The Security Council has primary responsibility to maintain international peace and security does not mean that it has the sole responsibility in the

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[1] The UN Charter, Article 39
[2] Ibid, Article 40
[3] Ibid, Articles 41 and 42
[4] Ibid, Article 29
[5] The Security Council through its resolution 1244 of 1999 and 1272 of 1999 has undertaken the administration over Kosovo and East Timor respectively. See, [Online: Web] accessed on 10 December 2023, URL: https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1999
[6] The UN Charter, Article 28
[7] Ibid, Article 27
[8] Malcolm N Shaw, *International Law,* (Cambridge: Cambridge University Press, 2014), at 877

matter. If the Security Council is unable to function due to veto of any of the permanent member or of any other reasons, the UN General Assembly can adopt effective measures regarding maintenance of international peace and security.[9] However, once the Security Council is seized of any matter, the General Assembly would be precluded from discussing the matter any longer.

The General Assembly is the most democratic body of the United Nations and truly represents the concept of sovereign equality of states. Each member states have one vote at the General Assembly. The resolutions adopted by the General Assembly are neither the source of international law nor create any binding obligations but the contents of some of the resolutions may become the customary principles of international law depending upon the acceptance by states of their normative value and the conditions of their adoption.[10] Both General Assembly and Security Council have equal powers to seek advisory opinions from the International Court of Justice (ICJ) on legal issues. The ICJ does not refuse to give advisory opinions on legal issues even if the situation, in respect of which the opinion is sought, is under consideration of the Security Council.[11] However, the ICJ may refuse to give such opinions if it finds the questions addressed to it as non-legal.

This basic structure of the United Nations is very important to appreciate the national security demands of any country vis-a-vis the United Nations. Countries may use the UN and manoeuvres their strategies to advance their national security demands in respect of maintenance of international peace and security.

Part II
UN Charter and the Use of Force

Article 2(4) of the UN Charter prohibits the member states to use or threat to use force against the territorial integrity or political independence of any state in their international relations. It also prohibits any use or threat to use force that is inconsistent of the purposes of the United Nations and thus makes the prohibitions complete. Deliberating upon this prohibition to use force, the Friendly Relations Declaration 1970 further elucidates the meaning of this prohibition and proscribes the following kinds of use of force under international relations.[12] First, wars of aggression are completely prohibited. Second, state should not use force to solve the boundary disputes. Third, states should not use force to deprive people from their right of self-determination and

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[9] UNGA Resolution "Uniting For Peace" of 3 November 1950, [Online: Web] accessed on 10 December 2023, URL: https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf

[10] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996), ICJ reports 1996, pp. 226-267, at 254-255, paragraph 70 [Online: Web] accessed on 10 December 2023, URL: https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf

[11] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of 22 July 2010) ICJ Reports 2010, pp. 403-453, at 414, paragraph 24 [Online: Web] accessed on 10 December 2023, URL: https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf

[12] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, UNGA Resolution 2625 of 1970. [Online: Web] accessed on 10 December 2023 URL: https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf

independence. Fourth, states should refrain from the acts of reprisals involving the use of force. Fifth, states should refrain from even the indirect forceful intervention in another state.

This prohibition to use force does not include political or economic force/coercion often employed in international relations. This prohibition even does not include physical non-armed intervention across the border or even the intervention through intangible data packets. However if the effect of such non-armed intervention like fire across the border or changing the course of a river or intervention through intangible data packets through cyber medium would be of devastating character, then it may come under the prohibitory ambit of article 2(4).[13] The prohibition is both against direct and indirect use of force. Thus, rendering substantive material support to contras or armed bands in another's territory attracts the prohibition.[14] However, this does not automatically raise the issues of state responsibility for the acts of those contras or armed bands.[15] The prohibition of use or threat to use force has become the customary principle of international law. *Prima facie* it seems that only the member states are prohibited under this article but it also applies even to the *de facto* regimes exercising established authority. This prohibition also applies to actions of international organisations or any regional security arrangements.

The terms 'political independence' and 'territorial integrity' do not mean to restrict the prohibition only to certain kinds of force. The ICJ in the famous *Corfu Channel* Case held that even the mine sweeping actions of British naval ships in the territorial waters of Albania would amount to the manifestation of a policy of force that was against the principles of international law.[16] Any kind of intervention against the political independence and territorial integrity of a state is prohibited. The prohibition against use of force protects the territorial inviolability of states. It includes all kinds of non-consensual intervention in land, air and waters boundary of any state.

Article 2(4) of the Charter prohibits the use or threat to use force only in the international relations of states. It does not prohibit the use or threat to use force in the internal matters of the state and this is governed by the domestic constitutional and legal principles. Thus states are not prohibited to use force or threat to use force to quell riots or any other rebellious activities within its borders. The use of force by state to eradicate armed groups active on its territory and engaged in non-international armed conflicts against such state is also not prohibited under international law. Any such use of force within its border would not come under prohibition under article 2(4) of the Charter. However, the legality of such use of force would be open to be questioned at the altar of human rights law and international humanitarian law as per the case. It

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[13] Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.) *Charter of the United Nations: A Commentary,* (Oxford: Oxford University Press 2012), at 210

[14] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America, Merits), 1986) ICJ Reports 1986, pp. 1-140, at 108, paragraph 228 [Online: Web] accessed on10 December 2023, URL: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf

[15] Ibid, paragraph 115

[16] The Corfu Channel Case (Albania v United Kingdom, Merits) ICJ Reports 1949, 1-38, at 34-35. [Online: Web] accessed on 10 December 2023, URL: https://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf

does not necessarily mean that any cross border slippage of the direct effects of such use of force would not come under the prohibitions.

There are also some exceptions to the prohibition on use or threat to use force. These exceptions could broadly be classified into two heads: (1) Security Council's Enforcement Actions and (2) Right of Self-defence.

(1) The Security Council Enforcement Actions: As discussed in the previous part, the Security Council can determine any threat to peace, breach of peace or acts of aggression and may take measures under articles 41 and 42 of the Charter to restore the international peace and security. Article 41 empowers the Council to recommend non-military measures like interruption in economic relations and means of communication and the severance of diplomatic ties. Article 42 empowers the Council to recommend military measures and action through armed forces necessary to maintain international peace and security. The choice of the measures depends upon the subjective satisfaction of the Security Council as per the gravity of situation. The example in recent history of the Security Council's authorisation to use force is resolution 678 of 1990 adopted in the backdrop of Iraq's invasion and occupation of Kuwait. This resolution authorises the member states to take all necessary means to uphold the previous resolutions of the Council and to restore international peace and security in the region.[17]

(2) The Right of Self-Defence: Article 51 of the UN Charter recognises the inherent right of individual and collective self-defence of states. It states that:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

There has been an extensive debate as to the precise scope of this article. One set of opinions assert that this article is exhaustive in its scope and no right of self-defence arise in absence of an armed attack. Another set of opinion say that article 51 is not exhaustive and it regulates only those cases of self-defence that arise after the armed attack, a subset of states' inherent rights of individual and collective self-defence. As per this, the scope of self-defence is not restricted to article 51 and it also exists beyond it.[18] The International Court of Justice in Nicaragua case accepts that article 51 of the Charter does not subsume the customary international law of self-defence.[19] Thus, both the Charter law and the customary law continue to regulate this area side by side.

The customary international law of self-defence emerges from the famous Caroline incident occurred between the US and the UK. As per the Caroline

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[17] UN Security Council Resolution 678 of 1990, [Online: Web] accessed on 10 December 2023, URL : http://unscr.com/en/resolutions/doc/678

[18] Malcolm N Shaw (2014), n. 8, at 821

[19] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, n. 14, at 94, paragraph 176

formulation, the necessity of self-defence must be instant and overwhelming and must not leave any choice of means and any moment for deliberation. Actions taken in self-defence must not be unreasonable or excessive since the act is justified by the necessity, it must also be limited by that necessity and kept clearly within it.[20] Any act of self-defence must be proportional to the instant and overwhelming threat.[21]

The right of self-defence is not subjective to the romantic intellectual conceptions or remote probabilities and fairy tales of possible attack. This right accrues to the states only after the occurrence of armed attack. There must be immediate and overwhelming need to take action in self-defence as there is no other meaningful pacific ways left to curtail the happening menace. The term 'armed attack occurs' does not mean that state should always first be hit physically and then takes action, though this is the ideal and preferred situation for application of this principle. The right accrues even when armed attack becomes imminent in all its probabilities. The actual realisation of this right depends upon many factual conditions on the ground depending upon the nature of the weaponry used and other geo-spatial considerations important for determining the imminence. For example, if the missile is launched in direction of the state concerned and if technically it can hit that state, then the state can take action in self-defence to destroy the missile or otherwise hit the targets in the country from where the missile originated even before the particular missile enters into the border of the state. Apart from these two situations i.e. occurrence of armed attack and imminence of armed attack, this principle does not admit any other distant and fairy rights of self-defence sometimes called as preventive or prohibitive self-defence. Accordingly, the legality of the use of force against Iraq on the pretext that Iraq had Weapons of Mass Destruction, though it could never be found, was questionable.

Article 51 of the Charter also admits the collective right of self-defence on the part of the states. This collective right of self-defence is not the mere accumulation of individual rights but altogether a different creature. It means collective security pacts among states such as NATO or Warsaw Pact where attack on any member state would be considered an attack against all the members and any one or all of them can take actions in self defence against the attacker. However, this right could only be exercised after the occurrence of the armed attack and after the specific request by the target state in this regard.[22] Any action taken under self-defence must be immediately reported to the Security Council and any such measures do not compromise the Security Council's right to adopt its own measures in respect of the particular situation.[23]

Part III
Some Debates about the Use of Force and Self-Defence

This part of the paper discusses the debates in respect of three specific areas related either to use of force or self-defence. These are: (1) Humanitarian Interventions (2) Protections of Nationals Abroad (3) Self-defence against Terrorism. The basic purpose to mention them separately is to accept their contested claims of legality and legitimacies.

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[20] Malcolm N Shaw (2014), n. 8, at 820
[21] Ibid
[22] Ibid, at 831
[23] The UN Charter, Article 51

(1) Humanitarian Intervention: This is one of the most controversial legal points of argumentation under international law. As per its primary understanding, the state can use armed forces to prevent or discontinue the mass violations of human rights and fundamental freedoms in any other state even without the Security Council authorisation. The supporters of this principle is of the opinion that the protection of human rights and fundamental freedoms must not be left to the chances of authorisation of measures by the Security Council that is often marred by the brutal considerations of national interest by its permanent members. There is no denial from this basic argument, but the open ended understanding of this concept leaves the wide scope of abuse and selective responses. These fears are also corroborated by the instances of the application of this understanding.

The concept of humanitarian intervention has been criticised by many scholars for it being hegemonic and open ended. Bruno Simma denied the legality of any use of military coercion without UNSC's authorisation to get the target state return to its human rights' obligations.[24] Christine Chinkin also criticizes this understanding for being selective and hegemonic.[25] As per Chinkin, states intervene where it would be feasible for them to intervene but they do not take it as a duty in other similar happenings.[26] There is also not any coherent state practice and *opinio juris* to indicate towards any customary international law towards this end.

Since this concept evokes emotions in its support and it is also right that the brutal and mass human rights abuses must not be left untouched by the reason of political manoeuvrings of any permanent member at the Council, there is no easy answer to the utility of humanitarian intervention. It seems that any use of force under humanitarian intervention, if the logic is employed for justification, must be very restrictive, precise and limited in its scope only for the protection against mass abuses of human rights. Any such force can only be employed after the exhaustion of all other remedies. Such intervention should not aggravate the sufferings of the people and must correspond to the IHL requirements of the use of force. Any such attempt must not aspire any other political goals than the immediate protection against the mass abuses of human rights. Any idea of regime change or decapitating sovereignty over the area directly or indirectly must be shunned.[27]

(2) Protection of Nationals Abroad: This is another very contesting point for discussion under international law of use of force. The core of the contention is the right of states to use force in the territory of third state to rescue their nationals. This right of the states is supported mainly on two grounds. First, that the impugned use of force is not against the article 2(4) of the Charter because it does not intend to violate territorial integrity or political independence of any state but only to ensure the protection of citizens of other state. Second,

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[24] Bruno Simma "NATO, the UN and the Use of force: Legal Aspects", vol. 10 Issue 1, 1999 *European Journal of International Law,* 1-22, at 5

[25] Christine Chinkin "The State that Acts Alone: Bully, Good Samartian or Iconoclast?", vol. 11 Issue 1, 2000, *European Journal of International Law,* 31-41, at 39

[26] Ibid

[27] B S Chimni, Sovereignty, Rights and Armed Intervention: A Dialectical Perspective in Hilary Charlesworth and Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy* (New York: Cambridge University Press 2010), at 317-322

the state has legitimate right of self-defence to protect its nationals abroad and can use force to that end.

The first argument seems untenable for the reason that article 2(4) prohibits any kind of non-consensual armed intervention. The second argument seems a bit rational approach towards describing the phenomenon. State in the capacity of ultimate agency to protect its nationals can exercise its right of self-defence to protect the lives of its nationals abroad. Since this kind of argument would open a slippery slope, there is also a need to evolve proper safeguards against its exercise. Any such use of force must correspond to all the requirement of Caroline test of self-defence. The force must always be used as last resort only if there is imminent threat to the lives of the citizens. However any lawful action complying with the standards of justice against the citizen of other states in abroad will not attract the right of self-defence to launch attack against the territorial state where judicial proceedings are in progress or properly culminated. As regard the protection of property abroad, it is well accepted that use of force employed merely to protect property abroad is not lawful.[28]

(3) Self-Defence against Terrorism: Terrorism has emerged as a recognised global menace since 9 September terrorist attack on the USA. Some of the countries were suffering from terrorism even long before the 9 September incident, but its gravity was realised on global platform once it started to knock at the doors of powerful western countries. Since then the UN Security Council has adopted many binding resolutions against terrorist funding, organisations etc. The Security Council's engagement against terrorism is so vast, expansive and evolutionary that it seems that a new branch of international law against terrorism is in the making. The absence of broadly accepted definition of terrorism or international terrorism seems no bar to take action against terrorist acts.

The Security Council on many occasions has reiterated that acts of international terrorism constitute threat to the international peace and security and emphasised the need to combat it by all means while complying with the provisions of the UN Charter. Thus, states have right to self-defence against terrorist acts. There is nothing in international law that restricts the right of self-defence of states only against states and not against non-state actors. The right to self-defence of states also extends against the non-state actors enjoying the direct or indirect patronage of another state or even without any such patronage. The main contentious issue in this respect, is the means and mediums of exercise of this right of self-defence. Since the exercise of this right against terrorists posing imminent threat may also amount to intervention against a territorial state. Primarily, there is no denial from this but there is also a need to maintain a fine balance between the respect of territoriality of the state and the adjoining state's right of protection against terrorist acts.

It is the demand of the elementary considerations of humanity that each and every state should not allow knowingly its territory to be used for acts contrary to the rights of other states.[29] It is the primary responsibility of a state

[28] Malcolm N Shaw (2014), n.8, at 830
[29] Corfu Channel Case (1949), n. 16, at 22

not to allow its territory to be used against the rights of another state.[30] Thus if any state harbours terrorists' organisation at its lands and any of such organisation carries attack on adjoining state and there exists imminent threats of more of such attacks, then it seems that targeted state may exercise its right of self-defence as per the Caroline standard, against such terrorist organisations situated beyond its own borders. However, any such use of force in self-defence must be restrictive and proportional. Referring some of the past instances of state's practices and another state's responses to such practices, it seems that this kind of right of self-defence against terrorism is at its dawn.

Part IV
Concluding Observations

The United Nations is playing a pivotal role in the maintenance of international peace and security. States are prohibited to use or threat to use force in their international relations but the cases of self-defence are permitted till the authoritative determination comes from the Security Council. States when subjected to aggression or armed attack or imminent threat of armed attack can use force to protect its territorial inviolability. This use of force in self-defence must be restrictive to the purposes of defence and proportional to the threat. The UN Charter and the customary law on the point recognise this exception to the general prohibition on the use or threat to use force. It is well established principle of international law that any kind of use of force or threat to use force except the cases of self-defence is strictly illegal. However, the changing dynamics of international relations finds different situations of exercise of the rights of self-defence by state. Some of these situations like self defence against non-state terrorist groups are evolving.

The study also admits that international relations have witnessed the carving of some emotive grounds for so called humanitarian intervention in the realm of legitimacy even if its legality is seriously compromised. The grounds of humanitarian intervention is very slippery, hegemonic and prone to be selective but yet it seems difficult altogether to reject it keeping in mind the situation of brutal human rights abuses and the corresponding failure of the SC to ameliorate it. However any such phenomenon must be restricted to the cause of protection of basic human rights – though the past instances of the application of this understanding indicate towards flagrant compromises of this safeguard.

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[30] Ibid

SPECIAL COURTS FOR CHILDREN - LESSONS LEARNT FROM INDIA

Dr. Ranjana Ferrao*

Abstract: Children may be victims of crime under the Indian Penal Code or the various preventive and protective laws. The Indian National Crime Records Bureau is the National Agency which records crimes against children. In the year 2021 the agency reported that there 1.49 lakh cases for commission of crime against children. India has passed a special law and set up special courts to try offences committed on children. These courts have been inspiring but have been faced with several difficulties. This article evaluates the Special Courts for children.
Keywords: Special Courts, offences, crime.

Introduction:

India has the largest child and adolescent population in the world. 444 million children are below eighteen years of age. Children are easy to target and become victims of crime. The Indian National Crime Records Bureau has reported that India records more than 350 crimes on children each day.[1] 38 percent of these crimes are sexual offences while 40 percent are crimes of murder and kidnapping. These crimes may be conducted in the online mode and the physical mode on the child.

The legal system must protect the rights of child victims throughout the judicial process. The wellbeing of the child at every stage of the trail is very important. TO punish heinous crimes of sexual abuse and sexual exploitation of children and provide stringent punishments India enacted The Protection of Children from Sexual Offences Act, 2012[2] which was passed on 19th June, 2012. This law has been in existence for the past ten years and has led to the setting up of Special Courts for trying offences committed on children. As on September, 2022 India has set up 412 Special Courts in 28 States and Union Territories.[3] The maximum numbers of crimes before these courts are under the heads of penetrative sexual assault and aggravated penetrative sexual assault.

The Indian law has greater advantages then many countries in the world. It is a gender-neutral legislation. Punishment could include life sentence and even capital punishment. Not reporting sexual crimes against children is a punishable offence.[4] The Indian law has done away with the limitation period for reporting an offence which means a child can report the crime even after many years. The law prohibits any kind of disclosure which would reveal the victim's identity. In 2019 the Out of the Shadows Index (OOSI) benchmarks report ranked India at number five position for its child protective legislation. India is

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[1] India Recorded over 350 Crimes against Children Each Day In 2020: NCRB Data, Outlook, Nov. 21, 2022 available at https://www.outlookindia.com/website/story/india-news-india-recorded-over-350-crimes-against-children-each-day-in-2020/396394

[2] Act No. 32 of 2012

[3] Department of justice, Ministry of Law and Justice, Government of India https://doj.gov.in/fast-track-special-court-ftscs/#:~:text=971.70%20Cr.-,as%20central%20share.,than%201%2C20%2C000%20pending%20cases.

[4] S.19

also ranked at the 15th position for its policies and practices against child sexual abuse violence.[5]

The Justice Process:

The offence must be reported to the police[6] or a child helpline.[7] The report must be filed by an adult for the child. The child is not permitted to lodge a complaint directly. The police record the complaint in writing and an FIR is registered.[8] The statement of the child is recorded by the police either at the residence or a place where the child would be comfortable.[9] Translators, interpreters and support persons are present to assist children who need their services.[10]

The child victim must be examined by a doctor within twenty-four hours.[11] After the medical examination the doctor must send a report of the examination to the police.[12] The police must report the offence to the Child Welfare Committee and the Special Court.[13] The Child Welfare Committee may provide support and assistance to the child. The police must collect evidence, send samples for forensic examination, and produce witnesses. The investigation must be completed and a chargesheet must be field before the Special Court within ninety days.[14]

India has set up Crime and Criminal Tracking Network and Systems-CCTNS. The CCTNS maintains records about the crime and criminal. India has also set up the Inter-operable Criminal Justice System-ICJS. Documents like FIR, case diary and charge sheet are uploaded by police on this website. These documents provide easy access to the police, courts, forensic laboratories and the jails authorities. There is also an Investigations Tracking System for Sexual Offences-ITSSO. This system has helped to police to complete investigation within 60 days in sexual offences against children. India also has also setup National Database on Sexual Offenders-NDSO.[15]

Special Court:

The state of Goa was the first state in India to pass a special law called the Goa Children's Act, 2004 and had set up a special court called as Children's Court in 2004. This court also functioned as a Special Court untill 2016. In 2016 separate special courts were notified. A "Special Court" is established by the State Government in conjunction with the "Chief Justice of the High Court." A "Special Court" is a "Court of Sessions" and has powers under Criminal Procedure Code. Delhi had instituted Vulnerable Witness Deposition Courts at Kakardooma in the year 2012, at Saket in 2014 and Dwarka in 2017. These courts were later designated as Special Courts. These courts in Delhi have a special room to record the child's statement. A separate room to record the

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[5] India ranks 15th in policies, practices against child sexual violence: Report SEP 25 2022Read more at: https://www.deccanherald.com/national/india-ranks-15th-in-policies-practices-against-child-sexual-violence-report-1148212.html

[6] S.19

[7] Rule 4(2)

[8] S.19

[9] S.24

[10] S.26

[11] S.19(5)

[12] Rule 6(5)

[13] S.19(6)

[14] S.173 Cr.P.C

[15] Sheraksha, Ministry of Home Affairs, Volume 1, Launch Issue 1, January – March 2019

testimony of the accused. A play room for the child. It has a kitchen and court room. Not all special courts in India have similar infrastructure, many are housed in court buildings and lack a even a waiting room for children. In South India the Special Court was set up in 2016 at Nampally in Hyderabad. In 2017 Bengaluru set up a Special Court.

A Judge and Public Prosecutor are appointed for the court. The special court takes cognizance of offences committed on children[16] and issues warrants to the accused. The accused has a "right to a fair trial," which is a key tenet of the criminal justice system. After hearing the prosecution and the defence charges are framed against the accused. If the court finds no evidence against the accused, the person would be discharged.

If the accused pleads guilty the Court can convict the accused for the offence committed. If no such plea is taken the trail begins with collection of evidence. The first stage is to record the child's statement. This statement must be recorded in the presence of a parent, guardian or relative.[17] The statement must be recorded within thirty days by the court.[18] The proceedings must be conducted in-camera.

The courts must respect the dignity of the child and never disclose the child's identity.[19] It is the duty of the court to create a child friendly environment. The questions must be put to the child by the judge and not the advocates. The courts must also stop any aggressive questions put to the child. Most importantly the child must not be called repeatedly to testify to the court. The accused is also examined. At this stage the courts must be cautious and prevent the accused from seeing or meeting the child in the court's premises.[20]

The reality is that children are called repeatedly to the court to testify. The courts are also granting adjournments and the child has to go back home without testifying. In some cases, a long date is issued and this results in delaying the trials. The Calcutta High Court in *Soumen Biswas v. State of West Bengal*[21] issued several directions. The court has prohibited the practise of granting adjournments to the parties while the child is bought to the court. Adjournment can only be granted if the child was unwell. Refusal to examine the child because of a lawyer's strike would amount to professional misconduct, and the lawyer could be liable for criminal contempt of court. If the child must travel from an outside state to the court, then techniques of video conferencing should be used.

If the court cannot record sufficient evidence to frame the accused the Court would acquit the accused.[22] If the accused is not acquitted the accused must present evidence to prove its innocence. After hearing oral arguments from the prosecution and the defence the Court must pronounce its judgment.[23] The Special Courts have shown higher acquittal rate than the conviction rate.

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[16] S.33(1)
[17] S.33
[18] S.33(2)
[19] *Sampurna Behura v. Union of India and Others*, (2018) 4 SCC 433
[20] S.36
[21] C.R.M. (DB) 2220 of 2022
[22] S.232 Cr.P.C
[23] S.235 Cr.P.C

If the accused is convicted the Special Court can pass a sentence of imprisonment and impose fine. The victim is usually awarded compensation.[24]This compensation is paid from the Victim Compensation Fund. It was hoped that the Special Courts would create a system of speedy trials and would be successful in completing the entire trail within one year. The criminal trails are moving at snail's pace and taking an average time of more than three years. There is a huge pendency of cases. Greater amount of time is spent in judging the amount the compensation to be awarded to the child.

Lessons Learnt:

The state has been unable to prevent commission of crimes against children. Specially crimes committed by children by their own family members or someone known to the child. Even before and after the case is registered the accused may be in contact with the child. The accused could threaten the child with retaliatory measures. Identifying a child victim is extremely difficult for the police. There are occasions where the crime is registered but the child is not available for recording the statement before the court. In sexual offences children cannot explain their body parts which have been infringed by the offender. This has resulted in collapse of the trial.

A unique situation arises when the child/adolescent refuses to undergo medical examination but the family member or investigating officer is insisting that the medical examination must be conducted. In a situation such as this, the law is silent on what is the way forward. The Special Courts in India can hear the cases only if the victim is a child. Unfortunately, the law has not provided provisions to determine the age of the child victim.

Children suffer from severe physical and mental injury as a result of the commission of the crime. The parents may be unable to afford the medical treatment specially in those case when the child has to be treated in a private hospital. Social impediments may cause additional problems and the family of the child may have to relocate their residence and find alternative educational facilities and employment for the child.

Several rights of the child remain unaddressed. The courts have failed to address the child's individual needs and views. Child victims must be provided with a "right to notice." This right will guarantee information about the case. The victims must be guaranteed a "right to protection." This will always keep the victim safe from the offender. Another important right is the "right to be present." This will enable the victim to follow-up on the entire process of the case. Victims must also be given "right to employment" and to protect existing employment if any must be guaranteed to the victim.

The Judge usually looks at the issue of providing compensation to the victims and planning their rehabilitation. The Supreme Court of India has held that in 99% of the cases interim and final compensation has not been paid to the child victims.[25]

The courts normally could grant 7 lakhs as compensation for an offence of sexual assault which is an amount stipulated in the Victim Compensation

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[24] S.33

[25] Re: Alarming Rise in The Number Of Reported Child Rape Incidents SMW (Crl.) No. 1/2019 Vide Order Dated 13.11.2019

Scheme. The Delhi High Court in *X v. State of NCT of Delhi*[26] realizing that this amount is not sufficient specially in cases where the child had a grievous injury. The amount prescribed might not cover the cost of medical treatment. The court has instructed the Delhi Legal Services Authority to pay the child 7 lakhs +50% of 7 lakhs i.e., 10.5 lakhs. Thus, making affordable justice a reality. Victims must be able to prepare their own plan of empowerment and rehabilitation. The courts in *Hanumantha Mogaveera v. State of Karnataka*[27] have held that 'A dedicated unit must be set up in every District Hospital to attend to the child victim and provide proper medical facilities and whenever necessary children must be referred to a private hospital. States must provide available mental health professionals to every child to overcome the trauma. The rehabilitation cost must be borne by the state.'

Concluding Observations:

The courts have also concluded that if an adult knows the consequences of his act and does not show any signs of reformation. The punishment must be severe. The Ministry of Women and Child is working towards framing a legislation to include castration as a punishment for offenders of sexual offences. The courts are also mindful that on many occasions the accused take the plea of insanity and try to escape the nose of law. The courts have also held that "sexual psychopathy" is that it is nearly untreatable, necessitating long-term imprisonment or other forms of incapacitation.

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[26] CRL.A. 63/2022

[27] Criminal Petition No.2951 OF 2020 Connected with Criminal Petition No.3000 OF 2020

A CRITICAL ANALYSIS OF THE LEGAL FACETS OF UNIFORM CIVIL CODE IN INDIA

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Abstract: The Uniform Civil Code (UCC) is a topic of profound significance in the realm of law, governance, and social discourse. Rooted in the principles of equality, justice, and secularism, the UCC is a proposed legal framework that seeks to replace the existing personal laws governing various religious communities in a country with a single, uniform set of civil laws applicable to all citizens, regardless of their religious beliefs or cultural background. This concept is often at the center of passionate debates and discussions, as it represents an attempt to harmonize diverse religious practices and traditions with the principles of a modern, egalitarian society. The idea of a Uniform Civil Code touches upon issues of gender equality, individual rights, and the separation of religion from civil matters, making it a complex and contentious subject with far-reaching implications for the legal landscape and social fabric of a nation. In this exploration, we will delve into the origins, significance, controversies, and potential consequences of the Uniform Civil Code, aiming to provide a comprehensive understanding of its multifaceted nature and its relevance in today's world.

Keywords: Secularism, Religious practices, Religious Freedom, Inheritance, Marriage, Family, Uniform, Civil.

Introduction:

The Uniform Civil Code (UCC), often referred to as "One Nation-One Law," is enshrined in the Indian Constitution under Article 44 of the Directive Principles of State Policy, which obligates the State to strive for a Uniform Civil Code applicable to all citizens across the nation.[1] However, the legal enforcement of this provision is restricted by Article 37, as these principles are meant to guide state policy rather than being legally binding.[2] Goa remains the sole exception, preserving the Goa Civil Code even after gaining independence from Portuguese rule in 1961, while the rest of India follows distinct personal laws based on religious or community identities.[3] The UCC's primary objective is to replace these diverse Personal Laws, governing matters such as marriage, divorce, inheritance, adoption, and maintenance, with a unified set of regulations for all citizens. Recent attempts to introduce the Uniform Civil Code Bill in the Rajya Sabha faced strong opposition, but there is growing anticipation that the government may present the Bill in the upcoming Parliamentary Session. The prospect of implementing a Uniform Civil Code (UCC) in India has ignited a significant and ongoing debate within the country. Many believe that it is essential to reevaluate the need for such a code, considering the complexities of diverse personal laws based on religious and community affiliations that currently govern various aspects of citizens' lives. The discussions surrounding the UCC revolve around issues of legal uniformity, gender equality, and the

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[1] Shimon Shetreet, *Uniform Civil Code For India* 98 (Oxford University Press, India, 2nd edn., 2018)

[2] M.S Ratnaparkhi, *Uniform Civil Code: An Ignored Constitutional Imperative* 45 (Atlantic Publishers and Distributors Pvt Ltd, India, 1st edn., 2019)

[3] Dr. Sitaram, *Uniform Civil Code Vision and Challenges* 56 (Satyam Law International, India, 2nd edn., 2022)

harmonization of diverse cultural and religious practices, making it a crucial and contentious topic in Indian jurisprudence and society.

The developed nations, such as the United States, Canada, Australia, the United Kingdom, and Russia, have embraced the Uniform Civil Code as a progressive legislation in order to improve their society, culture, and religion, as well as to eliminate prejudice across populations. India ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 9th July 1993. Once ratified, India has an obligation to follow the provisions of the CEDAW. Article 5(a) of the CEDAW states that it is an obligation of a State to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Such a modification in India needs to be made via the UCC.

Development of Concept of Uniform in India

The concept of a Uniform Civil Code (UCC) in India has a long and evolving history that spans several important milestones. The origin of the Uniform Civil Code (UCC) in India can be traced back to colonial times when the British government issued the Lex LOCI report in 1840, emphasizing the need for uniformity in codifying Indian laws related to crimes, evidence, and contracts.[4] Notably, the report recommended excluding the personal laws of Hindus and Muslims from this codification process. The Queen's Proclamation of 1858 further entrenched this distinction as a measure of "non-interference in religious matters." This approach, however, had a hidden agenda of divide-and-rule that bolstered British authority over Indian subjects. When Dr. B.R. Ambedkar was drafting the Indian Constitution, he expressed skepticism about maintaining this distinction within personal laws, particularly concerning its potential implications for women and religious minorities. He envisioned the UCC as part of the Directive Principles of State Policy, incorporated in the Constitution with the expectation that it would be implemented when the nation was ready to accept it.

The Hindu Code Bill played a pivotal role in shaping the UCC's trajectory. The draft prepared by the B.N. Rau Committee in 1941, chaired by Dr. Ambedkar, underwent discussion in 1951 after the Constitution's adoption. Dr. Ambedkar's revised bill aimed to reform Hindu laws, legalizing divorce, opposing polygamy, and granting daughters inheritance rights. However, as discussions, opposition, and debates persisted, the Hindu Code Bill lapsed and was re-submitted in 1952. Following several amendments and revisions, the Hindu Code Bills were fragmented into four separate acts: the Hindu Succession Act, the Hindu Marriage Act, the Hindu Minority and Guardianship Act, and the Hindu Adoptions and Maintenance Act, which were ultimately adopted in 1956. It's worth noting that in 2018, the Law Commission of India released a Consultation Paper on 'Reform of Family Law,' opining that the formulation of a Uniform Civil Code (UCC) was neither necessary nor desirable at that stage.

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[4] Jyoti Rattan, "Uniform Civil Code in India: A Binding Obligation Under International and Domestic Law**"** 46 J*STOR* 578 (2016)

The history of the Uniform Civil Code (UCC) in India has been marked by periods of advancement and setbacks, reflecting the complexities of implementing a uniform set of personal laws in a diverse and pluralistic society. While the UCC idea has faced challenges and resistance at various points in history, it is essential to recognize that its foundational concept has persisted. Throughout India's journey as a nation, the UCC has continued to be a topic of discussion and debate, reflecting the ongoing quest to strike a balance between respecting diverse cultural and religious traditions and ensuring fundamental rights and gender equality for all citizens.

Judicial Approach on Uniform Civil Code:

The Indian judiciary has, in a majority of instances, demonstrated a favorable stance towards the idea of a Uniform Civil Code (UCC).[5] Through a series of landmark judgments, it has consistently highlighted the importance of a UCC in harmonizing the diverse personal laws prevalent in the country. In the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum*[6], the Supreme Court expressed deep regret over the non-implementation of Article 44 of the Constitution, which envisaged a Uniform Civil Code (UCC) for all citizens of India. Despite possessing unequivocal authority to establish a UCC, the State had, regrettably, not made any concerted efforts in this direction. The Court went a step further, emphasizing the vital desirability of a UCC, noting that its enactment would foster national cohesion and integration by eliminating the potential for differential treatment based on religious affiliations. The responsibility for instituting a UCC rested squarely with the State, and it was not incumbent upon communities to merely express their preference for it. The Court underscored that political and ideological challenges should not serve as obstacles in achieving the aspirations laid out in Article 44, firmly believing that a UCC would ultimately ensure justice for all. In the case of *Sarla Mudgal v. Union of India*[7], the Supreme Court underscored the governments' inability to enact a Uniform Civil Code (UCC). The Court astutely noted that with over 80% of citizens already governed by codified laws, particularly the Hindu Law, it was illogical to exclude the remaining populace from the purview of a uniform civil code. The Court highlighted a concerning disparity wherein a Hindu man could potentially evade punishment for bigamy by converting to Islam and marrying multiple wives simultaneously, a situation that appeared patently unjust. The Court firmly asserted that opposition from various communities should not impede the establishment of a UCC. It clarified that matters like marriage and succession lacked religious safeguards under the Right to Freedom of Religion. Furthermore, the Court went a step further, beseeching the State and governments to earnestly consider and fulfill their constitutional obligation as delineated in Article 44.

In the case of *Shayara Bano v. Union of India*[8], the Supreme Court firmly emphasized the constitutional imperative for the State to institute a Uniform Civil Code (UCC) as a means to address the complexities stemming from

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[5] The Uniform Civil Code and Judicial Activism, *available at:* https://www.barandbench.com/apprentice-lawyer/the-uniform-civil-code-judicial-activism (last visited on Sept. 13,2023)

[6] AIR 1985 SC 945

[7] 1995 SCC (3) 635

[8] (2017) 9 SCC 1

personal laws. A parallel call for a UCC resonated in the Apex Court's judgment in *Jorden Diengdeh v. S.S. Chopra*[9]. Furthermore, the Supreme Court reiterated the pressing need for a UCC in the case of *John Vallamattom v. Union of India*[10], underscoring that religion and personal laws should not be considered intertwined in a civilized society. The Court firmly delineated religious freedom from the realm of personal laws, affirming that these are distinct and separate facets, as per its authoritative interpretation. In a recent judgment of *Satprakash Meena v. Alka Meena*, the Delhi High Court emphasized the need for a Uniform Civil Code (UCC). The court pointed out that young people in India should not have to deal with the complications arising from different laws based on citizens' religious beliefs, especially in matters like marriage. However, it is important to note that subsequent judicial orders, such as those in the Ahmedabad Women Action Group Case (1997) and the Lily Thomas Case (2000), clarified that the Court did not issue a direct directive to the government to enact a Uniform Civil Code in response to the Sarla Mudgal Case. While the Sarla Mudgal Case initiated a discourse on the need for a UCC in India, the subsequent rulings highlighted the nuanced nature of the Court's stance and the complexities surrounding the implementation of such a code.

These judgments have consistently underscored the need to harmonize diverse personal laws and establish a unified civil code that transcends religious and cultural boundaries. By upholding the principle of a UCC in various legal decisions, the Indian judiciary has not only advocated for a more equitable society but has also reaffirmed its commitment to modernizing the legal framework to align with the evolving needs and aspirations of India's diverse and dynamic population.

Goa Model of Uniform Civil Code

Goa, a former Portuguese colony, was incorporated into the Union of India in 1961.[11] In 1987, Goa was made a separate state. Goa is the only state where a uniform civil code is followed. After India annexed Goa in the year 1867, the existing Portuguese Civil Code, 1867 was not altered. It applies to all the Goans living in the state irrespective of their religion. The Goa Daman and Diu Administration Act of 1962, which was passed after Goa joined the union as a territory in 1961, gave the state of Goa permission to apply the Portuguese Civil Code of 1867, subject to amendment and repeal by the appropriate legislative body. This is an exception as no other state has adopted a common civil code. Hindus, Muslims, and Christians in Goa are all subject to the same laws on marriage, divorce, and succession. Muslims who register their marriages in Goa are prohibited from engaging in polygamy and triple talaq.

The Uniform Civil Code in Goa stands as a progressive and egalitarian legal framework. It promotes gender equality by ensuring the equal division of income and property between spouses and among children, irrespective of their gender. In Goa, it is compulsory to register every birth, marriage, and death, fostering transparency in vital life events. The divorce provisions are well-defined, and notably, for Muslims who register their marriages in Goa, the

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[9] 1985 SCR Supl. (1) 704
[10] Writ Petition (civil) 242 of 1997
[11] Elgar Noronha, "Portuguese Civil Code: The Silent Law that Unites Goa, Daman and Diu" , *Frontline,* July 27,2023

practice of polygamy and the use of triple talaq as a means of divorce are prohibited. Throughout the course of a marriage, all property and wealth owned or acquired by each spouse are held jointly. In the event of divorce, each spouse is entitled to half of the property, and in case of death, ownership is equally shared by the surviving member. Moreover, parents are unable to disinherit their children entirely, as a minimum of half of their property must be passed on to their offspring, with equal distribution among them as an essential requirement. But there are some flaws in the Goa Uniform Civil Code too. Let's have a look at some of the flaws. The Goa Civil Code is not strictly a uniform civil code, as it has specific provisions for certain communities.

Marriage: As far as the marriage aspect is concerned, Article 1057 of Goa Portuguese Civil Code elaborates upon registration of marriages wherein the intent to marry is recorded by the to-be spouses before the civil registration authorities and after a period of 2 weeks, the deed of marriage is executed. Catholics enjoy certain privileges, such as exemption from marriage registration and the ability of Catholic priests to dissolve marriages. Catholics can solemnise their marriages in church after obtaining a No Objection Certificate (NOC) from the Civil Registrar. For others, only a civil registration of the marriage is accepted as proof of marriage.

If the marriage is not consummated, a church tribunal may declare it null and void. However, non-Christians must obtain a divorce through the courts, and they cannot do so on the grounds that the marriage has not been consummated.

Polygamy: The Goa Civil Code enables a particular type of polygamy for Hindus but does not extend the Shariat Act to Muslims living in Goa, who are instead subject to both Portuguese law and Shastric Hindu law. The law also doesn't recognise bigamy or polygamy, including for Muslims, but grants an exception to a Hindu man to marry once again if his wife doesn't conceive a child by the age of 21 or a male child by the age of 30.

Divorce: A divorce granted by the ecclesiastical (Church) authorities is treated as a valid divorce for civil purposes, while non-Catholics have to secure a divorce before a civil court. In terms of gender, a man is entitled to a divorce if his wife has an affair. However, a woman can only obtain a separation on grounds of her husband's infidelity if it has resulted in a public scandal and a divorce if he brings his mistress into their marital residence. If her husband deserts her, she is also entitled to a divorce.

Uttrakhand Model of UCC

The expert committee tasked with formulating a UCC in Uttarakhand has achieved a significant milestone by successfully completing its draft and submitting the comprehensive report to the state government. Justice (retd) Ranjana Prakash Desai, who leads the committee, expressed her satisfaction with the extensive provisions contained in the proposed code.[12] Notably, the draft UCC for Uttarakhand places a strong emphasis on promoting gender equality and addressing economic, social, and religious disparities. Among its

[12] UCC to be Implemented in Uttrakhand this Year, *available at:* https://timesofindia.indiatimes.com/india/ucc-to-be-implemented-in-uttarakhand-this-year-cm-dhami/articleshow/103181376.cms?from=mdr (last visited on Sept. 10,2023)

key provisions, the draft ensures equal rights for daughters and sons concerning property inheritance, responsibilities towards parents, and grounds for adoption and divorce, irrespective of religious affiliations.[13] Additionally, the draft introduces the requirement of a mandatory declaration for initiating and terminating live-in relationships, aimed at preventing deception in such matters.

The recommendations put forth by the expert committee encompass a proposed two-child norm for eligibility in government jobs, welfare schemes, and government contracts.[14] However, the ultimate decision regarding the inclusion of this provision in the draft Bill remains pending. Responding to the demands of Muslim women, the draft Bill takes a stand against practices such as polygamy, iddat, and halala. Nevertheless, the committee is awaiting the Supreme Court's verdict on same-sex marriage before finalizing provisions related to the LGBTQIA+ community. It's important to note that unlike the Law Commission of India, which primarily advises the government on legal reforms, the Uttarakhand expert committee possesses the authority to oversee the implementation of the Uniform Civil Code within the state, signifying a unique role in the process.

Prospects and Challenges in Implementing Uniform Civil Code in India

By imposing a single national civil code of conduct, the UCC aims to unite all Indians under a common legal framework, effectively erasing boundaries dictated by caste, religion, or tribe. It is seen as an avenue to enhance women's rights, as it challenges the inherently misogynistic nature of religious personal laws that have long subjected Indian women to subjugation and mistreatment. By championing uniformity in laws governing marriage, inheritance, family, and land, the UCC advocates assert that it will ensure equal treatment for all Indians, reinforcing the principle that every citizen must be subject to the same legal standards, irrespective of religious affiliation. Crucially, proponents emphasize that the UCC promotes true secularism, as it does not curtail religious freedom but rather ensures uniform application of laws regardless of religious beliefs.

Moreover, several provisions of specific personal laws currently violate fundamental human rights. A UCC would rectify these violations, bringing the legal framework in line with international standards and fostering a more just society.

Additionally, Article 25 and Article 26 of the Indian Constitution guarantee freedom of religion, and the implementation of a UCC is not in opposition to the concept of secularism. It is about creating a uniform legal framework while preserving individual religious beliefs.

Presently, in India, different communities are governed by different Personal laws like Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Adoption and Maintenance Act 1956 & Hindu Minority & Guardianship Act (1956). Similarly, Muslims, Parsis and Christians are governed by their own

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[13] Smriti Kak Ramachandran, *"UCC Draft Focuses on Rights of women : Uttrakhand Penal Chief" ,* The Hindustan Times, June 30,2023

[14] Uttrakhand Expert Committee Completes Draft of Uniform Civil Code, Submits Report to State Government, *available at*: https://www.latestlaws.com/latest-news/uttarakhand-expert-committee-completes-draft-of-uniform-c (last visited on Sept.15,2023)

personal laws. Even within a religion, there is not a single common personal law governing all its members. E.g. for registration of marriage among Muslims, laws differ from place to place. It was compulsory in J&K (1981 Act), and is optional in Bengal, Bihar (both under 1876 Act).

Needed for national integration: Uniform Civil Code will separate religion from social relations and personal laws, ensuring equality and thus harmony in the society. In *Mohd. Ahmed Khan v. Shah Bano Begum*, Supreme Court observed that, "A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies." It will help in integration of India, as a lot of the animosity is caused by preferential treatment by the law of certain religious communities. This could in time induce custodians of faith to look inwards and seek to codify and reform age-old personal laws in conformity with current modernizing and integrative tendencies.

Gender Justice: UCC will promote gender justice by removing the inbuilt discriminatory provisions of personal laws. Under the Hindu law, the Mitakshara branch of law denied to a Hindu daughter a right by birth in the joint family estate and this flowed logically from the fact that her place in the paternal family was only temporary as she was belonged to her husband's family on marriage. Islamic law prescribes that generally a man's share of the inheritance is double that of a woman in the same degree of relationship to the deceased. Under Muslim law, the father is the sole guardian of the person and property of his minor child.

Freedom of Choice: A religion neutral personal law would encourage protection of couples in case of inter-caste and inter-religious marriages. Even Acts like the Special Marriage Act, 1954 permits any citizen to have a civil marriage outside the realm of any specific religious personal law.

Plurality and diversity: It has been argued that UCC threatens a pluralistic society like India, where people have confidence in their respective religious beliefs or doctrines that have been presented by different religions. In 2018, Law Commission of India opined that the Uniform Civil Code is "neither necessary nor desirable at this stage" in the country. The Commission said secularism cannot be contradictory to plurality. It only ensures peaceful co-existence of cultural differences. It is this plurality that also makes it difficult to evolve consensus on UCC.

Indian Secularism: The Supreme Court in *T.M.A Pai Foundation v. State of Karnataka* reiterated that the essence of secularism in India is recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole united India. The idea of UCC might not be inconsonance with the spirit of Indian secularism where multiple individual identities co-exist under the umbrella of the national identity.

Concerns of Minorities: The are impediments in adoption of the UCC when it comes to addressing Minority concerns, such as separatism, conservatism and misconceived notions about personal laws. Most minorities fee a sense of insecurity, complete loss of identity and marginalization within Indian society and imposition of a majoritarian outlook on minority religions, if UCC comes into play.

Concluding Observations:

The UCC in India is undeniably a matter of great significance in the present time. In a nation as vast and diverse as India, where various personal

laws exist in parallel, often in stark contrast to one another, the need for a uniform code to govern essential aspects of life becomes increasingly evident. While Goa has successfully implemented the UCC, it is important to recognize that even in this case, there are certain imperfections and inconsistencies that need to be addressed. The recent developments in Uttarakhand regarding the UCC offer a glimmer of hope for the entire nation, but its true impact and implications will only become clear in the coming days. The numerous judicial decisions that have underscored the necessity of a Uniform Civil Code further reinforce the urgency of this matter, emphasizing that it is indeed a matter of the present time that requires serious deliberation and action to promote harmony, equality, and justice in India's diverse society. The UCC in India is undeniably a matter of great significance in the present time. In a nation as vast and diverse as India, where various personal laws exist in parallel, often in stark contrast to one another, the need for a uniform code to govern essential aspects of life becomes increasingly evident. While Goa has successfully implemented the UCC, it is important to recognize that even in this case, there are certain imperfections and inconsistencies that need to be addressed. The recent developments in Uttarakhand regarding the UCC offer a glimmer of hope for the entire nation, but its true impact and implications will only become clear in the coming days. The numerous judicial decisions that have underscored the necessity of a Uniform Civil Code further reinforce the urgency of this matter, emphasizing that it is indeed a matter of the present time that requires serious deliberation and action to promote harmony, equality, and justice in India's diverse society.

In a nation that prides itself on its democratic values, the implementation of a UCC that respects the cultural diversity while promoting a common legal framework is not just a legal imperative but a moral one. It is a crucial step towards achieving a more equitable society, ensuring gender justice, and fostering national unity. As India continues to evolve and progress, the issue of the Uniform Civil Code remains a pivotal topic for discussion and reform, one that holds the potential to shape the future of the nation and its commitment to principles of justice, equality, and unity in diversity.

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COPYRIGHT AND PUBLICITY RIGHTS IN TATTOOS AT CROSSROADS

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Abstract: The issue of copyright in the tattoos has actually been quite complex, and rather controversial. Tattoos can be perceived and can be reproduced because they are visible on the skin. Tattoos can be reproduced by photograph or sketch. The expression on the skin is fixation in any tangible media. If we say that the artist has exclusive right over the tattoo as he/she puts his labor (that is skill) in the creation of the tattoo. So, tattoos are eligible for copyright protection. Tattoos can be protected by copyright especially if inked on the body of a well-known person. If there is no agreement or pre-discussion about the licensing, the host on whose body the tattoos are present should have the right to authorize any third party to display the tattoo as long as it is related to the image or identity of the person. This paper discusses the law relating to tattoos, their ownership and touches upon the issues of intellectual property of tattoos as a general as well as specific art or design.
Keywords: Copyright, Tattoos, Law.

Introduction:

Merriam-Webster dictionary defined a tattoo as a mark, figure, design or work intentionally fixed or placed on the body. Mostly it is indelible and created by insertion of pigment under the skin or which is applied temporarily on the skin. Any person who comes up with an original idea or piece of work gets sole ownership of it.[1] It takes a lot of effort and time to come up with a new concept of tattoo or work that no one else has considered. The artists or inventors of such an idea wish to preserve their intellectual property, which they produced; thus, laws are enacted to prevent their property from being stolen or duplicated. This concept of originality can also be applied to tattoos, but it is not easy to decide the ownership as rights of two persons are involved and the drawing of the art is not paper but the body of a person. This short paper discusses the law relating to tattoos and their ownership of them. It also touches upon the issues of intellectual property of tattoos as a general as well as specific art or design.

Ownership of the Tattoos:

According to 17 U.S. Code § 102[2], *copyright protection exists "in original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated."*[3] Chapter IV of the Indian Copyright Act provides for ownership of copyright and rights of owner and Section 17 specifically designated who is the first owner. In India the author is the initial owner of the copyright according to the Section 17 of the Copyright

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[1] https://www.merriam-webster.com/dictionary/tattoo last retrieved, 22nd March 2023.
[2] Subject matter of copyright: In general
[3] https://www.govinfo.gov/app/details/USCODE-2011-title17/USCODE-2011-title17-chap1-sec102 last retrieved, 22nd March 2022. For a detailed view, please visit https://www.copyright.gov/title17/ last accessed, 22nd March 2023.

Act of 1957[4] that means the person who has designed the tattoo is owner. However, the person who is getting the tattoo can also become the owner if the tattoo artist signs a contract of service agreement with them.

So, tattoos can be perceived and can be reproduced because they are visible on the skin. Tattoos can be reproduced by photograph or sketch. The expression on the skin is fixation in any tangible media. So, tattoos are eligible for copyright protection. Tattoos can be protected by copyright especially if inked on the body of a well-known person, a sportsman, celebrity, artist, or any famous person. The best example is a tattoo of Mike Tyson.[5] The tattoo artist who put the tattoo on his body received registration or the tattoo for it as artwork on a 3D object in 2011. So, all the artworks which are related to the tattoo are the property of the owner of the copyright. A tattoo artist who inks anything which is protected by copyright, without permission is infringement. The artist must take permission from the copyright owner of the image. The illustrator can use this for economic gain which would affect the potential market of the copyright owner.

In the case of *Solid Oak Sketcher LLC v. Visual Concept LLC.*[6] when Lebron James' tattoos were shown in the game and cover art for the game the company Solid Oak who Sketched the tattoo sued the game owner in 2016. In March 2020, a federal judge held that in case of tattoos of MBA player the artist cannot sue for its depiction in NBA 2K video game. The reason for such a decision was given that the artist knows that tattoos of famous athletes are likely to be displayed in public, so they necessarily granted the player on whose body the tattoo is present, a non-exclusive license to use the tattoo as part of their likeness. The other reason given by the court is transformative fair use.

In the case *Catherine Alexander v. Take-Two Interactive Software, Inc.*[7] when the game developer, the defendant, created a 2k video game of WWE wrestler, the artist sued the video game developer. The court rejected the defendant's motion for summary judgment and held that there were issues of fact related to its transformative fair use defense which needs to be addressed.

When be the owner's right violated?

Reproduction of a tattoo or public display of an original tattoo can be unlawful depending on the three major factors which are fair use, de minimis use and implied license.

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[4] The full Act can be found at, https://copyright.gov.in/documents/copyrightrules1957.pdf last accessed, 22nd March 2023.

[5] https://patentlawip.com/blog/hangover-copyright-infringement-of-tyson-tattoo/ last accessed, 22nd March 2023.

[6] 16-CV-724-LTS-SDA. For the full text of the case, https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2016cv00724/452890/166/ last accessed, 22nd March 2023.

[7] 18-cv-966-SMY, 2020. For a detailed opinion, please refer to, https://casetext.com/case/alexander-v-take-two-interactive-software-inc-4 last accessed, 22nd March 2023.

Implied license-The implied license does not transfer the ownership to the person but merely permits the use of a copyrighted work in a particular manner. An implied license can be created when the licensee requests.

Since things are still not clear about this issue, it is humbly submitted that, if there is no agreement or pre-discussion about the licensing, the host on whose body the tattoos are present should have the right to authorize any third party to display the tattoo as long as it is related to the image or identity of the person.

Fair use-According to 17 U.S.C 107[8] (Limitations on exclusive right: Fair use) fair use depends on *(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.*

Use of the copyrighted work is fair if the user transforms the work of the artist into different work. In the case of *Bill Graham Archives v. Dorling Kindersley Ltd,*[9] it was held that the use of the tattoos on the body of the players in the videogame are of small size and difficult to observe so they are transformative. In the videogame, tattoos are mere elements made to create a lush experience for game users. The tattoos are a tiny fraction of the videogames.

The purpose and character of the use were defined in the *Bill Graham* case in which the Second Circuit Court of Appeals delivered the summary judgment in favour of the publishers (defendant) of *Grateful Dead:* The Illustrated Trip, a 480–page coffee table book which provides a history of the Grateful Dead using a timeline and more than 2000 images. 7 of these pictures were copyrighted so are infringement. The court held that since the purpose of the defendant related to the historic artifacts to document the concept in the form of the book is different from the plaintiff that is an artistic expression. In the case of the second point which is the nature of copyright, the court disagrees with the defendant that tattoos are minimally protected by copyright. It held that even though the direction was given by Orton (the person on whose body tattoos were inked) still the plaintiff has used his creativity which makes it copyrightable.

It is humbly submitted that, if the image of the tattoo is drawn by the person and totally directed by, he/she and the artist only followed the direction, in such case the copyright should vest with the person not with the artist because the artist just followed the instruction, he/she didn't use his mind.

In the case of the third factor, the work is copied. The fourth factor which talks about the market harm to the defendant is a relevant factor and would depend on the amount of harm caused.

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[8] https://www.govinfo.gov/app/details/USCODE-2010-title17/USCODE-2010-title17-chap1-sec107 last accessed, 22nd April 2023.

[9] *448 F.3d 605, 607 (2d Cir. 2006)* For the full text of the case, please refer to https://www.copyright.gov/fair-use/summaries/billgraham-dorling-2dcir2006.pdf last accessed, 11th March 2023.

De minimis use-There would not be copyright violations if the copying falls below the quantitative threshold of substantial similarity. In the absence of substantial similarity, it is not copying. De minimis use is decided by whether the viewer can identify that the work in question is a copy of the protected work or not. Let's try to support this argument with personality theory and labor theory.

What the theories of IPR say?

Familiarity with personality theory-In the 21st century, tattoos have taken an important position in body art. A person gets an image on his/her body that is permanent (subject to voluntary removal) and is visible to the whole world. Since in most cases the tattoos have deep meaning for the person who wears them and is also emotionally attached to the art inked on the body. It would last for the life of the person if not removed, the person perceived it as part of his/her being.[10]

This theory is less concerned with rewarding labor and more concerned with respecting the emotional or psychic bond between the artist and the creation. In respect of the artist and the tattoo there is use of skill and imagination of the artist to produce the tattoo and this application of mind and imagination make the tattoo a part of his personhood, even though it is present on the body of another person. We can justify the rights of the artist on the tattoo as he uses his skill and makes the tattoo as part of his/her person or body, which creates right over that tattoo as he has right over his/her body.

According to the opinion of the author, there is can be a different aspect of this theory in this case. It is about the rights of the person on whose body the tattoos are inked. Almost all the people who inked a tattoo have a deep emotional meaning attached to it. Even if it is just a normal tattoo, still it has special importance for the person. We can only say that the first taken by the person as he/she decides to create the tattoo. Without the decision of the person, the subject matter cannot come into existence. We cannot apply this logic of personality theory in this case as it is because the other person is also involved. The artist for the sake of his creation cannot have control over the body and personality (hence control over liberty which is a fundamental right) of the other person.

When a person decides to ink a tattoo on his body, he also decides to make it a part of his/her body till the physical body exists (subject to removal by his/her own will). The person decides to extend his own physical boundaries and make the tattoo a part of his/her physical body. This is entirely supported by the personality theory. The implied license in favor of the person supports my opinion.

Familiarity with labour theory-The sole basis of the labor theory is that if a person puts labor work on a subject (land in case of Lock) then he acquires rights on the subject. Thought originally Lock did not consider the intangible property but it can be asserted by interpretation as many scholars have opined

[10] For detailed perspective on this theory, refer https://doi.org/10.1371/journal.pone.0245158 last accessed, 22nd March 2023.

the same that the property about which Lock is talking includes intangible property too. If we say that the artist has exclusive right over the tattoo as he/she puts his labor (that is skill) in the creation of the tattoo. Though the labor theory entirely supports the artist because according to him ownership of the final product should track ownership of the most valuable component thereof, which is labor. We can support the answer to the question that tattoos are protected by the copyright because the artist produces it by using his labor (using his skill and creativity). When there is unauthorized use of the tattoo, he/she should have right to stop the infringement or to sue the infringer.

Concluding Observations:

In the case of tattoos, there are two individuals involved the artist and the person on whose body the tattoos are inked. It is a special case as compared to other copyright scenarios because while taking care of the right of the tattoo artist we also need to take care of the privacy and right of the person over his body. Giving the absolute right to the creator like other copyright cases would be an injustice to the person. While deciding the issues related to tattoos the right of the person on whose body the tattoos are inked should be given special care.

Beyond what has been commonly proclaimed in court rulings, the law makers must lay down a defined ambit for publicity rights. In an ideal world, both the tattoo artist and the tattoo bearer should be barred from profiting simply based on the other's celebrity or creative talent. This must be decided by implementable and practical solutions for situations where misappropriation and authorized usage are difficult to differentiate. While carving out a legislature to govern this whole issue, the right of owner as well of the person on whose body tattoos have been inked, should be considered and a middle way should be proposed after harmonizing the right of both.

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ACTIVITIES OF A CHARITABLE TRUST AS A BUSINESS UNDER GST – AN ANALYSIS

Amalendu Mishra*

Abstract: A charitable trust is a way to hold and protect assets (money, property etc.) for charitable purposes. The trust assets are managed according to the purpose set out in a trust deed or in an agreed set of rules. Activity of a charitable trust can constitute a business under a G.S.T. Supply of goods or services in exchange for consideration is considered a business. Consideration refers to any payment made either monetary or non-monetary in return for the supply of goods and services. The nature of charitable trust should be examined and determined by GST council in each case for exemption from Goods and Services Tax based on specific function and circumstances in which charitable trust is discharging its obligation
Keywords: Trust, Charity, Assets, Income Goods, Services, Liability, Exemption.

Introduction

Goods and Service Tax (GST) has been a significant development in India's economic landscape. Implemented on July 1st, 2017, GST has had a profound impact on businesses and charitable trusts across the country. It has consolidated taxes, such as excise duty, service tax and value added tax (VAT) into one comprehensive tax system. This implementation has simplified the taxation structure in India making it easier for businesses and charitable trusts to comply with tax regulations. One of the key benefits of GST for businesses is the elimination of multiple taxes. Previously, businesses had to pay several taxes at different stages of production and distribution. However with GST in place these taxes have been replaced by a single tax payment system, which reduces complexity and compliance costs. Moreover GST has introduced input tax credits that enable businesses to claim credit for taxes paid on their purchases. This helps alleviate the tax burden for businesses. For charitable trusts, GST has also brought about certain changes. Under the previous tax regime, charitable trusts enjoyed exemptions and concessions on various services and goods. However, with the implementation of GST, some of these exemptions have been revised or removed. Charitable trusts must now thoroughly evaluate their operations. Ascertain if they meet the criteria, for any exemptions or concessions, under the GST regulations.

While charitable trusts are exempt from paying GST on the funds received as donations or grants, they are required to pay GST on any goods and services they procure for their activities. This includes expenses related to infrastructure, equipment, maintenance, and administrative services. To mitigate the impact of GST on their business activities, charitable trusts can avail themselves of various GST exemptions and concessions. These include exemptions on certain services directly related to charitable activities, such as healthcare and education. To ensure compliance with GST regulations, businesses and charitable trusts need to register under the GST regime and obtain a unique GST identification number (GSTIN). They are also required to file regular returns and maintain proper records of their transactions

Charitable Activities and Business- Concept

The term "business" under section 2(17)[1] encompasses a wide range of activities, including trade, commerce, manufacturing, professions, vocations,

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[1] Central Goods and Services Tax Act, 2017

adventures, wagers, and similar endeavors, regardless of whether they yield financial gains. It also includes any actions or dealings related to these primary activities. The scope extends to activities resembling those mentioned earlier, irrespective of their frequency or regularity. This includes the supply or acquisition of goods and services linked to starting or concluding a business. Additionally, it involves services provided by individuals in official capacities connected to their trade, profession, or vocation. The definition encompasses various aspects, such as club memberships, admission to premises for a fee, and activities related to racing clubs and licensed bookmakers. Furthermore, any undertakings by governmental bodies at various levels in their roles as public authorities fall within the purview of this definition.

Charitable Activities has been defined under the Paragraph 2 Clause (r)[2]. The term "charitable activities" encompasses comparatively narrow range of activities, meaning activities relating to (i) public health, (ii) advancement of religion, spirituality or yoga, (iii) advancement of educational programmes or skill development, or (iv) preservation of environment including watershed, forests and wildlife.

The term business in non-exhaustive and wide in nature, which includes trade, commerce, manufacturing, etc. regardless of whether they are done for pecuniary benefit they will constitute a business. Whereas the term charitable activities are exhaustive and narrow in nature comparatively which means activities for betterment of society. Thus it can be said that the term business is a super set which encompasses a subset charitable activities.

Whether the activities of the Charitable trust constitutes a Business under GST.

Goods and Services Tax means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption.[3] As in the definition of the GST it is clearly mentioned that only Taxes on the supply of alcoholic liquor for human consumption are excluded. Under GST the activities of a charitable trust may or may not be considered as a business, depending on the nature and extent of their operations. On the analysis of definition of GST it can be said that the activities of a charitable trust are not absolutely excluded from the GST.

According to the GST law, any activity that involves the supply of goods or services in exchange for consideration is considered a business. Consideration refers to any payment made, either monetary or non-monetary, in return for the supply of goods and services. It is important to note that each case should be evaluated based on its specific circumstances to determine the classification of activities carried out by a charitable trust under GST.

On analysis the definition of GST, business, and charitable activities we can say that the activities of a charitable trust can constitutee a business under GST. But in the public interest the Central Government has Power to Grant Exemption[4] on tax levied on goods or service or both on its satisfaction or on the recommendation of GST Council[5].

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[2] Notification No. 12/2017, Central Tax Rate, 28th June, 2017
[3] Constitution of India 1950, a 366(12A)
[4] Supra note 1, at s 11(1)
[5] Id. at s 2(36)

Central Government exercised its power under Section 11(1)[6] and published a Notification[7] in the official Gazette of India[8] granted exemption on the intra-State supply of services from the central tax leviable[9]. Notification 12/2017 central tax rate has brought significant changes to the activities of charitable trust in terms of taxation. Point to be kept in mind is that the Notification has only exempted Supply[10] of Services, the Supply of the Goods is not exempted by the Notification.

Examining the activities of charitable trust

Under the Notification No. 12/2017, various activities conducted by charitable trusts are now subject to certain tax exemptions. It is essential for charitable trusts to carefully examine their activities and determine if they fall within the scope of taxable activities as defined by the notification.

One of the key aspects that charitable trusts need to consider is the nature of their activities. If the activities fall under the ambit of activities defined under Paragraph 2 clause(r), they will be entitled to tax exemption. It is important for charitable trusts to assess whether their activities are charitable in nature, and involve the supply of services.

The Central Government by the Notification have exempted certain supply of services by a charitable trust from the tax leviable under ordinary circumstances. Exemption is available to a charitable trust on supply of services subject to the following conditions:

i. Trust must be registered under the section 12AA of the Income Tax Act, 1961. AND
ii. The services supplied by a trust must fall under the meaning of charitable activities.

i.) Trust must be registered under the section 12AA of the Income Tax Act, 1961.

The registration process under section 12AA of the Income Tax Act 1961 is a procedural requirement for charitable seeking tax exemptions. It is important for these organizations to obtain this registration in order to claim deductions on income generated through charitable activities and to avail other tax benefits.

Once necessary documents are collected and form 10A is filled, it should be submitted to the Commissioner of Income Tax (Exemptions) or the Assistant Commissioner of Income Tax (Exemptions) in the jurisdiction where the organization falls. The application should also be accompanied by the required documents. It is important to note that each jurisdiction may have its own unique requirements or additional documents that need to be submitted.

Once the registration is approved, the organization will receive a registration certificate under section 12AA, which will be valid until it is cancelled or surrendered. It is essential to mention the registration number on all correspondences with the Income Tax Department and to comply with all other requirements and regulations related to maintaining the registration.

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[6] Id.
[7] Supra note 2
[8] Extraordinary, Part II, s 3(i)
[9] Supra note 1, at s 9(1)
[10] Id. at s 2(47)

It is worth noting that the registration under section 12AA is not permanent, and the Income Tax Department has the authority to cancel or revoke the registration if it finds non-compliance or any violation of the conditions mentioned in the Act. The registration process under section 12AA of the Income Tax Act 1961 is a crucial step for charitable to obtain tax exemptions and avail other benefits.

ii.) Supply of Services by Charitable Trust

Charitable activities are an essential aspect of society and play a crucial role in bringing about positive change. In order to facilitate and promote charitable activities, the government has established various provisions and regulations, such as the Notification 17/2017 Central Tax Rate. This notification provides important guidelines and provisions for charitable trusts and their activities.

Within the Central Tax Rate Notification 17/2017, Paragraph 2 clause 'r' is particularly relevant when it comes to understanding the scope of activities. It precisely defines the types of activities that qualify as charitable and are eligible for tax benefits. Complying with these provisions is crucial for trusts to avail the benefits provided by the government.

Charitable trusts engaged in activities such as poverty relief, education, medical assistance, environmental preservation and other public utilities mentioned in clause 'r' can potentially qualify for tax benefits. These activities have impacts on communities at large. These benefits may include exemptions from certain taxes or deductions in the taxable income.

The philanthropic efforts undertaken by trusts greatly contribute towards betterment. The regulations outlined in clause 'r' within the Central Tax Rate Notification 17/2017 play a role, in governing and promoting these initiatives. Charitable trusts should make it a priority to adhere to these provisions. This will help them maximize the benefits they can receive and ensure they effectively contribute to the wellbeing of the community as a whole.

Cases to determine when the activities of a Charitable Trust are exempted under GST

It is significant to note that, with the exception of a few clauses, the provisions of the GST Act and a State GST Act are similar. A reference to the CGST Act would thus also pertain to a similar provision under a (State) GST Act unless a particular mention of the similar provision is made.

Whether GST is applicable on the supply of medicines, food, and room rent in hospitals operated by a Charitable Trust?

In the case of **In Re Terna Public Charitable Trust**,[11] the Maharashtra Authority for Advance Ruling (GST) made some important observations regarding the taxation of healthcare services provided by hospitals under GST Laws.
They determined that hospitals are considered clinical establishments under GST laws and are exempt from GST for providing healthcare services, as per Sr. No. 74 of Notification No. 12/2017-CT(Rate). This exemption covers various aspects of hospital services, including the supply of medicines and other items by the hospital-owned pharmacy, as well as the provision of food to patients and room rental for in-patients. Essentially, all these services are seen as part of a

[11] *In Re Terna Public Charitable Trust* [2019] Mah AAR-GST 32

single healthcare treatment package. They referred to the clarifications issued based on the approval of 25th GST Council Meeting held on 18-01-2018 [12] is proper. Therefore the supply of medicines and other allied items provided by the hospital through the hospital owned pharmacy, as well as food, room on rent to the in-patients is part of composite supply of health care treatment and hence not taxable under GST Laws.

The Authority also pointed out that room rent for in-patients[13] is exempt, as per Circular No. 27/01/2018-GST, and that food provided to in-patients under medical guidance is part of the comprehensive healthcare service and not separately taxable.

However, the situation differs for out-patients. [14] When out-patients purchase medicines and other items from the hospital pharmacy, these transactions are not considered part of the composite healthcare service and are subject to GST. This distinction arises because the sale to out-patients is a direct transaction, similar to purchases from regular pharmacies outside of hospitals, which are subject to GST.

The ruling clarified that healthcare services provided by hospitals, including in-patient services, are exempt from GST under specific conditions. Still, when out-patients buy medicines from the hospital pharmacy, they are subject to GST, similar to purchases from non-hospital pharmacies. The distinction lies in the nature of the transaction and its relation to healthcare services.

Whether the hostel, and mess facility provided to College Students by a Charitable Trust are exempted under GST.

The Hon'ble Karnataka High Court in the case of **CIT v. Karnataka Lingayat** [15] held that the education society that provides hostel to the students/staff working for the society's incidental to achieve the object of providing education, namely the object of the society. Further added that providing of hostel facilities and transport facilities to the student and staff member of the educational Institute cannot be considered as business activity but is subservient to the object of educational activities performed by the society.

The Hon'ble Allahabad High Court in the case of **IIT v. state of UP**,[16] wherein question arose in with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel, which involved supply, and sale of food was an integral part of the objects of the Institute nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business.

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[12] F. No.- 354/17/2018-TRU Dt. 12-02-2018

[13] The in-house patients are those who are admitted into the hospital for the required treatment.

[14] The out-patients (OPD patients) are those who visit the hospital for routine checkup or clinical visits.

[15] [2014] ITA 5004

[16] [1976] 38 STC 428

Taking above two judgments into consideration the Income Tax Appellate Tribunal held in the case of **Kanha Charitable Trust v Additional Commissioner of Income Tax**[17] that transport and hostel facilities are part of the 'educational activities' of the appellant and they cannot be considered different then activities of the society of 'education'. The hostel and transport facilities is incidental to achieve the object of providing education as per object of the trust. Maintaining hostel/mess facility to students is an essential & integral part of Education[18] and not a Separate Business Activity[19].

Whether the Adoption Fees by a Charitable Trust is exempted under GST

In the case of **In Re Children of the World India Trust**[20] the question before the Maharashtra Authority of Advance Ruling was whether the adoption fees charged by the Children of the World (India) Trust exempted under the Notification No. 12/2017. The Authority observed that the adoption fee collected by the institute is strictly in terms of guidelines fixed by the Adoption Regulations, 2017 issued under the JJ Act. As per the Regulations, a Specialized Adoption Agency (SAA) can charge a fee of Rs. 40,000 under the head Child Care Corpus from the adoptive parents. The applicant, being a SAA, charges fees of Rs. 40,000 as a corpus which in turn is used for shelter, food, clothing, foster care, maintenance, medical treatment and primary education and basic computer skills of these abandoned children/orphans in their Bal Vikas Kendras till the time they are adopted.

The Authority held that the trust have established a shelter "Vishwa Balak Kendra" in their own building and provide shelter, food, clothing, healthcare, foster care and basic education to abandoned, orphaned or homeless children below 6 years of age till the time of adoption is an Charitable Activities.

The Authority further held that their activities, including the activity of facilitating the adoption of the children by the Adoptive parents, are in the nature of "Charitable Activities", which also consists of advancement of educational programmes or skill development relating to abandoned, orphaned or homeless children. Such activities are clearly covered under Sr. No. 1 of Notification No. 12/2017[21] and are exempted by the said notification.

Whether vvocational training ccourses recognised by National Council for Vocational Training (NCVT) is exempted under GST.

In the case of **In Re Leprosy Mission Trust India**[22] question before the Andhra Pradesh Authority for Advance Ruling (GST) is whether services provided by the Leprosy Mission Trust India under vocational training courses recognised by National Council for Vocational Training (NCVT) is a charitable activity and is exempted either under Entry No. 64 of exemptions list of Goods and Services Tax Act, 2017 or under Educational Institution defined under Notification 12/Central Tax (Rate).

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17 [2017] ITAT 17078
18 Income tax Act 1961 s, 2(15)
19 Id at s, 11(4A)
20 [2019] Mah AAR-GST 74
21 GST Notification No. 12/2017 of Central Tax Rate dated 28th June 2017
22 [2020] AP AAR-GST 13

The Authority observed that the trust falls under definition of education vide the Clause No. 2(y)(iii) as 'education as a part of approved vocational education training' in GST Notification No. 12/2017.[23]

The further observed that the approved vocational education course is also defined in clause 2(h) of the above mentioned Notification No. 12/2017 and it is observed that the applicant was granted affiliation by the National Council for Vocational Training (NCVT) in respect of vocational skills and held that vocational course are attracting NIL rate of tax under GST Act, 2017 (Entry 66 of Notification No. 12/2017).

Whether stipend for training, charges for additional training, and one time payment for selection for job are exempted under GST.

In the case of **In Re Cadmaxx Solutions Education**,[24] the Karnataka Authority for Advance Ruling (GST) made some important determinations regarding the taxability of services provided by the applicant.

Firstly, the ruling clarified that when the applicant acts as an intermediary for providing on-the-job training to trainees, the stipend paid to trainees by the trainer companies is not subject to GST. This is because the trainees are the ones providing the services to the trainer companies, and the applicant is merely a conduit for transferring the stipend without making any deductions. So, the actual service is considered to be provided by the trainees to the trainers, and it's not taxable in the hands of the applicant.

However, when the applicant offers additional training to trainees, and the trainer companies are charged for this service, it is not exempted under Notification No. 12/2017. Therefore, it is taxable under entry no. 35 of Notification No. 11/2017.[25]

Furthermore, if the applicant charges a one-time fee when a trainee, sourced by them, is selected and hired by a company for regular employment, this service is also liable to GST.

The ruling distinguishes between the tax treatment of stipends paid to trainees and charges for additional training or placement services, stating that the former is not taxable in the applicant's hands, while the latter is subject to GST.

Whether supply of purified water to the public at a reduced rate by a Charitable Trust through Dispensers or Mobile Tankers exempt from GST.

In the case of **In Re Vijayavahini Charitable Foundation,**[26] the Andhra Pradesh Authority for Advance Ruling (GST) made a determination based on the examination of Entry No. 99 in Notification 02/2017.[27] Sr. No. 99. of the Notification 02/2017 states that, "Intra state supplies of Water [other than aerated, mineral, purified, distilled, medicinal, ionic, battery, demineralized and water sold in sealed container]"

The ruling noted that this exemption entry excludes specific categories of water, such as aerated, mineral, purified, distilled, medicinal, ionic, battery,

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[23] GST Notification No. 12/2017 of Central Tax Rate dated 28th June 2017
[24] Cadmaxx Solutions Education [2019] Kar AAR-GST 94
[25] GST Notification No. 11/2017 of Central Tax Rate dated 28th June 2017
[26] Vijayavahini Charitable Foundation [2021] AP AAR-GST 2
[27] GST Notification No. 02/2017 of Central Tax Rate dated 28th June 2017

demineralized, and water sold in sealed containers from being exempted from GST. In this particular case, the supply in question was "purified water," which undergoes purification using the Reverse Osmosis (RO) process in plants established by the applicant.

As a result, the ruling concluded that since the water supplied is "purified water" and falls under the exclusion criteria mentioned in the exemption entry, it is subject to GST and not eligible for exemption.

Whether the activities of the World Researcher Association which is an international non-profit company are charitable activities .

In the case of **In Re World Researchers Associations**,[28] the applicant is involved in activities like promoting research in various fields, performing and publishing online research journals, and organizing seminars. The Madhya Pradesh Authority for Advance Ruling (GST) made a significant observation regarding the definition of "Charitable Activity."

They pointed out that the definition of Charitable Activity is not all-encompassing; instead, it's exclusive. This means that only specific activities listed as Charitable Activities are eligible for exemption. In this case, the applicant's activities, such as research promotion and online journal publication, don't fit within the defined scope of Charitable Activities.

However, when it comes to organizing Seminars, Symposiums, and Conventions, they fall under the category of "spreading public awareness." If these events are aimed at raising awareness about preventive health, family planning, or HIV prevention, they may qualify for the exemption. The key factor here is whether the programs are open to the public or restricted to a specific group. If they are genuinely aimed at the public, they may qualify.

Since the determination of whether an activity qualifies for exemption depends on specific facts in each case, an Advance Ruling cannot be made without considering these facts.

The ruling stated that some of the applicant's activities do not fit the definition of Charitable Activities for GST exemption. However, seminars and similar events could be exempt if they genuinely aim to raise public awareness about specific health or social issues, but this depends on the specifics of each case.

Whether the sale of spiritual products by charitable trust with the main objective of advancement of religious, spirituality, or yoga can be said to business Under GST.

In the case of **Shrimad Rajchandra Adhyatmik Satsang Sadhana Kendra v Jurisdictional Officer Assistant Commissioner of Sales Tax**,[29] the appellant is a public charitable and religious trust primarily dedicated to spreading the knowledge of Jain Dharam (religion). They argued that as part of their ancillary and incidental objectives, they sell spiritual products like books, audio CDs, DVDs, statues, and calendars. They referred to a Supreme Court judgment, **CIT v. Gujarat Maritime Board**,[30] where it was held that if the

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[28] World Researchers Associations [2019] MP AAR-GST 95

[29] Shrimad Rajchandra Adhyatmik Satsang Sadhana Kendra v Jurisdictional Officer Assistant Commissioner of Sales Tax [2018] Mah AAAR-GST 22

[30] CIT v. Gujarat Maritime Board [2007] 14 SCC 704 (SC)

primary or predominant object of a trust is charitable, then even ancillary or incidental objects not necessarily charitable in nature will be considered charitable.

However, the Maharashtra Appellate Authority for Advance Ruling (GST) took a different stance. They emphasized that the definition of 'business' under the CGST Act is broad and encompasses various activities, including trade, commerce, profession, and more. Since the trust sells goods and services to those interested in purchasing them, this activity aligns with the trust's objectives. This implies that the trust is involved in supplying goods and services, which falls under the definition of 'business' in the CGST Act. The legislative intent appears to tax all activities of supplying goods and services by charitable trusts, unless explicitly exempted. Certain services have been exempted, which indicates that commercial transactions like selling books, statues, CDs, and DVDs are considered part of 'business' under the CGST Act.

Additionally, the Appellate Authority clarified that the Supreme Court judgments cited by the appellant were given under the provisions of The Bombay Sales Tax Act, 1959, and the definition of 'business' in that Act differs from the one in the CGST Act. The CGST Act's definition is more comprehensive, so the Supreme Court's rulings were in a different context.

The ruling concluded that the trust's sale of spiritual products falls within the scope of 'business' as defined in the CGST Act, and the Supreme Court judgments cited by the appellant do not apply in this context due to differences in definitions between the two Acts.

Whether the activities of trust engaged in disaster prevention, mitigation, and management are charitable activities.

In the case of **In Re All India Disaster Mitigation Institutes**,[31] the applicant is a charitable trust with a mission centered on disaster prevention, mitigation, and management. Their objectives, clearly outlined in their Memorandum of Association and bye-laws, primarily involve community-based research, policy analysis, planning, and technical assistance in disaster prevention and management.

The Gujarat Authority for Advance Ruling (GST) carefully examined the applicant's activities and determined that their work in disaster prevention, mitigation, and management falls under the broader category of "preservation of the environment." Consequently, these activities are considered charitable in nature.

Based on this classification, the Authority ruled that the applicant, being registered under Section 12AA of the Income-tax Act, 1961, is exempt from GST taxation under Entry No. 1 of Notification No. 12/2017. This exemption from GST registration is in line with Section 23(l)(a) of the Central Goods and Services Tax Act, 2017, which applies to charitable activities related to the preservation of the environment.

The ruling established that the applicant's disaster prevention and management activities, considered a form of environmental preservation, qualify as charitable activities exempt from GST registration.

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[31] All India Disaster Mitigation Institutes [2019] Guj AAR-GST 12

Whether the conduct of marathon events by the Trust through which donations are raised for charity is an exempted service under GST.

In the case of **In Re Dream Runners Foundation Ltd.**,[32] the Tamil Nadu Authority for Advance Ruling (GST) examined the status of a charitable trust. This trust is registered under Section 12AA of the Income Tax Act, 1961, and it has also obtained approval under Section 80G of the Income Tax Act, which allows donors to claim tax deductions.

The trust engages in various activities and events aimed at raising funds for charitable purposes. These activities include organizing marathon events, blood donation camps, organ donation camps, and more. Importantly, these activities are conducted for the benefit of the general public in India, without any profit motive. However, the trust's annual turnover exceeds Rs. 20 lakhs.

The Authority made a key determination regarding the funds collected by the trust from participants in marathon events. They ruled that these funds are considered as consideration for the supply of services and are not exempted under the GST Act. This is because the collected funds are used to cover the costs associated with organizing the marathon event, making it fall under the definition of consideration for a service. Additionally, the definition of "charitable activities" in the GST Act is quite specific, and marathon events organized by the trust do not fit within this definition, which means they are liable for GST.

Furthermore, the Authority determined that the trust must register under the CGST/TNGST Act because their annual turnover exceeds Rs. 20 lakhs, and they provide taxable services, including the organization of marathon events. This decision is based on Section 22 of the CGST/TNGST Act, which mandates GST registration for suppliers whose aggregate turnover in a financial year exceeds Rs. 20 lakhs.

Concluding Observations:

In conclusion, the determination of whether the activities of a charitable trust constitute a business under GST involves a nuanced examination of the nature and scope of those activities. Under the GST regime in India, the definition of "business" is broad and encompasses various activities including trade, commerce, and more, whether or not they are pursued for financial gain. On the other hand, "charitable activities" have a narrower scope, focusing on endeavors related to public health, religion, education, skill development, and environmental preservation.

Numerous cases have offered insights into how GST treats charitable trust activities. Some activities that align directly with charitable objectives and are explicitly mentioned in GST notifications receive exemptions. However, not all charitable trust activities are automatically exempt. Activities involving the sale of goods or services may still be subject to GST unless expressly exempted. Determinations depend on the specific nature, purpose, and alignment with defined charitable categories, as well as whether they involve consideration for goods or services.

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[32] In Re Dream Runners Foundation Ltd. [2019] TN AAR-GST 8

MASTER OF THE ROSTER: A CRITICAL ANALYSIS OF THE ONE-PERSON ADMINISTRATION IN SUPREME COURT OF INDIA

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Abstract: The Master of the Rolls started out as an English convention which was later adopted by India and was moulded into its own judiciary model. The Chief Justices of the High Courts and the Chief Justice of India were given this ex officio power. In India, the Master of the Roster is seen as an administrative position held by the Chief Justice of the High Courts in the High Court and the CJI in the Supreme Court. The composition of a bench leads to speculation of the outcome and this needs to be kept at a minimum. The foremost responsibility of a judge is to abide by the Rule of Law and thereby abandon unconstitutional practices. But, in a plethora of cases, it has been observed that there is no guided reason as to why the case has been allotted to a particular judge even if the subject matter of the case is not within the area of expertise of the judge. This paper tries to critically highlight the unguided power vested with the Chief Justices of the High Courts and the CJI and recommends certain ways to decentralise this one-person authority.

Keywords: Master of the Roster, allotment of cases, decentralisation, collegium.

Introduction:

For the past few decades, the Chief Justices of various courts in the country, primarily the Supreme Court have been given the complete responsibility of assigning cases to judges of the court. This institutionalized practice has made way for misuse of statutory power. The outcome of this has not only led to an undemocratic rule in the judiciary. It is time that the judiciary wakes up to rectify its blunders. In an attempt to clear up doubts in relation to the recent stir involving the Chief Justice of India, the author will be looking at the controversial convention of the Master of the Roster as practiced in our country.

Master of the Roster-History of Deriving the Power

The Master of the Rolls started out as an English convention which was later adopted by India and was moulded into its own judiciary model. The Chief Justices of the High Courts and the CJI were given this ex officio power. Thus, all power was vested in one person. This has so far helped in avoiding ego clashes and ensuring smooth functioning of the Courts. The system has not been without its faults though.

In India, the Master of the Roster is seen as an administrative position held by the Chief Justice of the High Courts in the High Court and the CJI in the Supreme Court. In terms of judicial power, the word of any of the judges of the SC carries the same weight as that of the CJI. He is thus merely "first among equals."[1] In terms of administrative powers however, the CJI is put in a different

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position. Since the Constitution of India, 1950 is ambiguous in defining the administrative duties of judges, conventions and rules have developed to do so. One such duty is the determination of the bench. In India, the HCs and SC follow the roster system to allot cases.[2] This system lists out which judges or benches are to hear matters pertaining to a particular subject matter or area of law. The determination of roster is done by the CJI for the SC. This power of the Chief Justice is derived jointly from the Indian Constitution, Supreme Court Rules, and judicial precedents.

The Indian Constitution, under Articles 145(3) and (4) dictates the minimum number of judges required to constitute a bench ruling on an important question of law, generally and for a petition under Article 143.[3] Further, the Supreme Court Rules state that the Registrar must prepare a roster under the instructions of the CJI.[4] It also provides the mandate to be followed for reference of a case to a higher bench.[5] It says that reference of a case by a lower bench to higher bench must be routed through the CJI who will decide whether there is need for the said reference. Neither of these provisions explicitly mention the role of the Chief Justice as sole determinant of the roster.

However, the Court in its jurisprudence has read that meaning into a combined reading of the two provisions. In *State of Rajasthan* v. *Prakash Chand,*[6] a full bench held that the power to constitute Division Benches and decide what cases these Benches will hear is a power that rests solely with the Chief Justice of the High Court. No Single or Division Bench of the High Court can give directions to the Registry which are contradictory to that of the Chief Justice's.[7] It further said that if a Single Bench or a Division Bench feels that a particular case must be listed before it, it should direct the Registry to obtain relevant orders from the Chief Justice for the same. Puisne judges on the other hand, possess no such authority. A counsel wanting to present his case before a puisne judge must be ordered to make mention before the Chief Justice to secure the necessary orders.[8] This case relied on Article 225 of the Indian Constitution[9] to derive constitutional validation for certain powers of the Chief Justice that include deciding benches and preparing cause list.

Recently, this case[10] was affirmed by a constitutional bench presided over by the CJI in its order passed in the matter of *Campaign for Judicial Accountability and Reforms v. Union of India.*[11] It was held in the order that the principle in *Prakash Chand* must apply *proprio vigour* to the Supreme Court.

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[1] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589, ¶6.
[2] State of Rajasthan v. Prakash Chand &Ors, AIR 1998 SC 1344; Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589.
[3] INDIA CONST. art. 145.
[4] Supreme Court Rules, 2013, Gazette of India, section III(1), Chapter VI (May 29, 2014).
[5] Supreme Court Rules, 2013, Gazette of India, section III(1), Order 6, Rule 2, (May 29, 2014).
[6] State of Rajasthan v. Prakash Chand &Ors, AIR 1998 SC 1344.
[7] Id.
[8] Id.
[9] Supra note 3.
[10] State of Rajasthan v. Prakash Chand &Ors, AIR 1998 SC 1344.
[11] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589.

Thus, in light of the Supreme Court Rules[12] and Article 145(2) and (3) of the Indian Constitution, the Chief Justice of India is the Master of the Roster, and therefore the sole authority on constitution of benches and allocation of cases to the Benches so constituted. The Court further went on to say that no Division Bench or Full Bench could allocate a case to themselves or order the formation of a Bench. Any work done by a judge too has to be screened through the Chief Justice in order to be accepted.[13]Along the same lines, the judges in *CJAR* observed that even the Chief Justice of India plays the same role as those of the Chief Justices of the High Courts.[14] Additionally, even the SC's Practice and Procedure and Office Procedure[15] give power to the CJI to direct the Judicial Registrar to prepare a roster of cases.[16] It also mentions how the CJI can direct a particular bench to take up the work of another bench due to non-availability.[17]

Arbitrary Use of the Power by CJI- Analysis of Cases

Often addressed as a black day for the Indian Judiciary, the press-conference by the then four most senior judges[18], wherein they alleged the mismanagement and bias shown by the then CJI[19] in allocating matters to the judges. Before, taking this severe step, they wrote a letter where they put the following allegation against the CJI.

> *"There have been instances where case having far-reaching consequences for the Nation and the institution had been assigned by the Chief Justice of this Court selectively to the benches "of their preference" without any rational basis for such assignment. This must be guarded against at all costs."*[20]

"It would have been better for the judicial institution had it been a bald allegation. However, the relevant statistics favours their version and thereby, puts a question mark on the 'infallibility' of the office. During the tenure of the said CJI, total eight (8)[21]Constitution Bench matters were taken up and

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[12] Supreme Court Rules, 2013, Gazette of India, Section III(1), Order 6, Rule 2, (May 29, 2014).
[13] Amar Singh v. State of Uttar Pradesh, Crim. Appeal No. 4922 of 2006 (Allahabad HC).
[14] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589.
[15] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, http://supremecourtofindia.nic.in/practice-and-procedure (last accessed on 03.05.2023 at 10:26 P.M.).
[16] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Chapter 5,http://supremecourtofindia.nic.in/practice-and-procedure (last accessed on 03.05.2023 at 10:26 P.M.).
[17] Id.
[18] Justices Jasti Chelameswar, Ranjan Gogoi, Madan B. Lokur and Kurian Joseph,
[19] Justice Dipak Misra.
[20] https://www.livelaw.in/master-roster-not-recognition-superior-authority-colleagues-4-sc-judges-write-cji/ (Last accessed on 03.05.2023 at 10:38 P.M.).
[21] The State of Jharkhand &Ors. v. M/S Hindustan Construction Co. Ltd., Civil Appeal No. 1093 of 2006; Common Cause (A Regd. Society) v. Union of India &Anr., Writ Petition (Civil) 215 of 2005; Bir Singh v. Delhi Jal Board &Ors,, Civil Appeal No. 1085 of 2013; Navtej Singh Johar &Ors. v. Union of India, Writ Petition (Criminal) No. 76 of 2016; Public Interest Foundation &Ors. v. Union of India &Anr., Writ Petition (Civil) No. 536 of 2011; Justice K.S. Puttaswamy (Retd.) &Anr. v. Union of India &Ors., Writ Petition (Civil) No. 494 of 2012; Indian Young Lawyers Association &Ors. v. State of Kerala &Ors., Writ

judgments were rendered but except in one,[22] in no other case the then senior-most four judges were made members. At the same time, some other judges (who were relatively juniors) were commonly included in most of the Constitution Benches.**"**[23]

"The Constitution of India mandates that all cases involving substantial questions of law as to the interpretation of the Constitution shall be heard by a Bench of minimum five members.[24] It is quite important to have a rational basis for selection of judges to such Benches as the law laid down by such judges becomes the final constitutional interpretation. Keeping some members common in all the Constitution Benches and not assigning such matters to certain other senior-most members has a huge ramification. The CJI being the 'master of roster' can allocate any matter to any judge, but absence of rational consideration, makes every action suspicious and arbitrary."[25]

In an order passed in the case of *CJAR v. Union of India*, the SC relied on *Prakash Chand* and the aforementioned rules to declare that the CJI had the sole authority to decide the roster for cases in the SC. This order was passed by the CJI to annul a Division Bench order deciding the roster for this case. The matter was taken up and heard by the CJI in spite of the fact that he was amongst the people against whom allegations were levelled in the petition. This was a strong rejection of the principle of *nemo judex in causa sua*. The CJI was aware of the allegations; in his defence, he claimed that it was improper to accuse the CJI in his own court and it amounted to contempt. He further went on to say that only the President of India can be approached with a complaint against the CJI. The power of the master of the roster was further affirmed in two subsequent cases.[26]

In the case[27] of alleged sexual harassment against the then CJI, the three-member in-house inquiry committee even though exonerated him on the charges of sexual harassment, the fact that the in-house inquiry committee was formed by the then CJI himself[28] raised scores of questions on the efficacy and viability of the system.

In a recent case[29], the present CJI[30] passed an order that the applications that were filed before any Court for default bail shall be deferred

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Petition (Civil) No. 373 of 2006; Joseph Shine v. Union of India, Writ Petition (Criminal) No. 194 of 2017.

[22] Bir Singh v. Delhi Jal Board &Ors,, Civil Appeal No. 1085 of 2013.

[23] JYOTI PRAKASH DUTTA, "Master(s) of the Roster: A Proposal for Administrative Decentralisation in the Supreme Court of India", NLUO Project Archives.

[24] INDIA CONST. art. 145(3).

[25] Supra note 23.

[26] Asok Pande v. Supreme Court of India, (2018) 5 SCC 341; Shanti Bhushan v. Supreme Court of India, (2018) 8 SCC 396.

[27] In Re: Matter of Great Public Importance touching upon the Independence of Judiciary, SMWP (1) 1/2019.

[28] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830 (last accessed on 04.05.2023 at 01:58)

[29] Directorate of Enforcement v. Manpreet Singh Talwar, 2023.

[30] Justice D.Y. Chandrachud, Chief Justice of India.

beyond 4 May, 2023. But, the same judge in another case[31] had opined that *"Deprivation of liberty even for a single day is one day too many."* Such hypocritical orders may indicate that the law works only for the famous and the powerful ones wherein a matter was heard in a dingle day after filing with the registry of the top Court whereas in the present case, several bail applications were asked to be deferred depriving liberty of thousands.

In the same order, there was a direction made by the CJI that a bench of three judges be constituted to decide whether to recall an order passed by the Hon'ble Supreme Court in another judgment.[32] The fallacy committed by the CJI was that the order for constitution of a bench comes under the purview of the administrative functions of CJI and he passed the same through a judicial order. Moreover, the three-judge bench was constituted to hear whether to recall the previous judgment. The procedure of recall of a judgment can only be followed only when there is a clerical mistake or there is grave injustice caused to the parties or if the judgment was passed violating principles of natural justice. But, neither of these grounds were prima facie recorded and even the CJI gave an oral remark that they can't pass an order to stop relying on their judgment, passed an order to defer the applications of bail filed before any other Court on the basis of the judgment of Ritu Chhabaria.[33] If, the SC wants to recall a judgment, it should be heard by the same judges who had passed the order and only they have the power to recall it. But, giving a direction to constitute a higher bench to recall a judgment of lower bench shows the administrative arbitrariness of the CJI.

Controversies around it

In 2018, a controversy emerged in the Indian judiciary involving the allocation of cases by the Chief Justice of India. The issue revolved around the allocation of sensitive cases and the question of whether they were being assigned to benches selectively, by passing established conventions and senior judges' preferences.

The controversy reached its peak when four senior judges of the Supreme Court held an unprecedented press conference in January 2018. Justices Jasti Chelameswar, Ranjan Gogoi, Madan Lokur, and Kurian Joseph publicly raised concerns about the allocation of cases by the then-Chief Justice of India, Dipak Misra. They expressed apprehensions about the allocation of important cases to certain benches, bypassing senior judges who had expertise in those matters.[34] This move was significant because it highlighted a perceived lack of transparency and institutional integrity in the allocation of cases within the Supreme Court. The dissenting judges raised issues about the selective allocation of cases, suggesting that this might undermine the independence of the judiciary and erode public trust in the system.

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[31] Arnab Manoranjan Goswami v. The State of Maharashtra &Ors., Criminal Appeal No. 742 of 2020.

[32] Ritu Chhabaria v. Union of India, W.P. (Criminal) No. 60 of 2023.

[33] https://www.livelaw.in/top-stories/supreme-court-asks-all-courts-to-defer-applications-for-default-bail-based-on-ritu-chhabaria-judgment-which-centre-seeks-to-recall-227673 (last accessed on 03.05.2023 at 8:23 P.M.)

[34] Bhumika Indulia- "CJI is the Master of Roster; "Chief Justice" cannot be read as "Collegium" for allocation of matters: Supreme Court" SSC ONLINE, Published on July 6, 2018

The controversy sparked debates about the discretionary powers of the Chief Justice in constituting benches and assigning cases, leading to calls for clearer guidelines or mechanisms for more transparent and equitable case distribution. The incident also prompted discussions on the need to balance administrative efficiency with the principles of fairness and impartiality in case allocation. [35]

This episode in 2018 underscored the importance of upholding transparency and fairness in the functioning of the judiciary, particularly concerning the assignment of cases. It prompted renewed discussions on establishing norms or guidelines for case allocation to ensure that the process remains unbiased, credible, and in line with the principles of justice and equity.

Position of such powers in different countries (comparative analysis)

The concept of the "master of the roster" or case allocation authority, akin to Article 145 of the Indian Constitution, varies across different countries' judicial systems. Here is a comparative analysis between India and some other nations:

United States:

The Supreme Court of the United States has few similarities to the CJI in India, with the Chief Justice being responsible for managing the docket and assigning cases to justices, However, the US Constitution does not grant the Chief Justice the same level of administrative powers as the CJI in India. The Chief Justice of the Supreme Court does not hold the exclusive authority as the "master of the roster" akin to India. Instead, the practice of case allocation involves a rotating system among the justices, preventing concentrated authority in one person's hands.

In US, the allocation of cases to judges is governed by various laws and rules. For example, 28 U.S. Code section 636[36], allows a judge to designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule.

The Federal Rules of Civil Procedure for the United States district courts[37] also play a role in case allocation. The chief judge of each district court is responsible for enforcing the court's rules and orders on case assignments, and each court has a written plan or system for assigning cases. Most courts use some variation of a random drawing, and at times, judges with special expertise can be assigned cases by type, such as complex criminal cases, asbestos-related cases, or prisoner cases. Rule 53 of The Federal Rules of Civil Procedure[38] mentions the provisions related to criteria and order appointing the Master or Judge in particular cases. Geographic considerations can also come into play in the assignment of cases. The assignment of judges to cases is typically done to assure equitable distribution of caseloads and avoid judge shopping.

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[35] Pranav Verma- "Master and the roster, the collegium system has failed to keep executive interference at bay" THE HINDU (March 01, 2021)

[36] U.S. Code - Unannotated Title 28. Judiciary and Judicial Procedure, section 636- Jurisdiction, powers, and temporary assignment.

[37] The Federal Rules of Civil Procedure,1938

[38] Rule 53. Masters, The Federal Rules of Civil Procedure

United Kingdom:

In the UK, The Supreme Court of the United Kingdom does not have an independent 'Master of the Roster' role, although cases are allocated to justices by the Lord Chief Justice, who is the head of the court. The Lord Chief Justice also has the power to create and reorganize courts and to assign judges to specific cases or courts.

But there is a greater emphasis on collective decision-making within judicial councils or committees responsible for allocating cases. Transparency and fairness in case allocation are upheld through established guidelines and procedures.

The case allocation system in the UK is governed by specific guidelines and policies. For example, the Sentencing Council provides guidelines for determining whether cases should be dealt with by a magistrates' court or the Crown Court.

Sentencing guidelines provides a framework for the judges and magistrates in courts across England and Wales to opt an established approach to sentencing. Magistrates often deal with less-serious cases and shall pass the serious or complicated cases to the Crown Court.[39]

These guidelines outline the factors that should be considered when making allocation decisions, such as the seriousness of the offense and the likely sentence.

In addition, the government has also issued policies that detail the processes to be followed to allocate cases following sentence, including the criteria which must be applied/assessed to reach a decision about suitability

[In Europe, the European Networks of Councils for the Judiciary (ENCJ) in their annual report of 2013-14[40] , developed 11 standards for the allocation of cases, ensuring that cases are allocated on a basis compatible with Article 6 ECHR[41] , the report also stated that the opted method of allocation ensures fair and time-efficient administration of justice and enhances public confidence. According to the norms of ENCJ the responsibility for allocation sits with the President, Senior Judge of the Court, or a Court Board, with practical arrangements for allocation potentially being delegated to another judge or a civil servant authorized for the purpose]

Canada:

In Canada, the Chief Justice of the Supreme Court does have influence over case allocation, but it is largely guided by a collegial approach. There are established procedures and norms followed by the Chief Justice in consultation with other judges, ensuring a balanced and fair distribution of cases.

The federal government holds the responsibility of appointment of the judges of the Supreme Court of Canada, federal courts, and provincial and territorial superior courts, and the same powers are given to the provincial and territorial government for appointment of provincial and territorial court judges, but the power to allocate cases to these judges and courts lies with the chief justice of the province. The chief justice in each province and territory decides how that court manages the litigation process and which cases the judges will hear.

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[39] https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/

[40] ENCJ Project 2013-2014 Development of Minimum Judicial Standards IV: Allocation of Cases adopted Rome 13 June 2014

[41] Article 6 (FAIR TRIAL) European Convention on Human Rights

The Chief Justice of Canada has the power to decide which judges will hear a case. The Chief Justice oversees the work of the Supreme Court of Canada by designating the panels of judges who are to hear the cases and motions brought before it.

The Chief Justice also has the power to assign judges to cases, including the power to assign himself or herself to a particular case.

The Chief Justice may delegate the authority to assign and schedule cases to Regional Senior Judges, who may in turn delegate specified functions to other Superior Court judges in the region

The specific guidelines and criteria used by the Chief Justice in making these assignments are not explicitly outlined in the available sources. However, it can be inferred that the Chief Justice considers factors such as the nature of the case, the expertise of the judges, and the need for a fair and efficient allocation of cases in making these assignments.

Therefore, the assignment of cases to judges in Canadian Courts is part of the Chief Justice's broader responsibility (for the administration of the court system and the maintenance of the independence of the judiciary) making it quite similar to Indian judicial system of case allocation.

Australia:

The allocation of cases in Australian courts is done through a national allocation system for judicial matters prescribed in The National Court Framework (NCF), which ensures the consistent and appropriate allocation of judge-related matters and the effective management of the court's judicial workload.

'Upon filing, the matter will be allocated to the Docket Judge, and in appropriate cases, the matter may also be assigned to a Case Management Judge and/or a Class. Matters are allocated based on the individual docket system, considering workload management, National Practice Area (NPA) expertise, and the character of matters filed.' [42]

The Chief Justice or the National Operations Registrar may consult with senior judges of the court about the characterisation and allocation of a matter. (It is important to note that the allocation of cases may vary depending on the court or tribunal)

Therefore in Australia, case allocation is guided by the Chief Justice or the National Operations Registrar but follows a practice of consultation with other justices. The Chief Justice typically presides over the allocation process, but decisions are made collectively as per the guidelines of NCF, focusing on equitable distribution, and avoiding potential biases.

Therefore on comparison with the trends around the world, while some countries vest significant authority in the Chief Justice or equivalent positions for case allocation, many of them also employ mechanisms to ensure transparency, fairness, and collective decision-making in distributing cases among judges. India's system, as per Article 145, accords substantial discretionary power to the Chief Justice, which makes it more powerful and independent than any apex court of other countries, creating concerns about transparency and potential biases in case assignment.

Recommendations:

[42] https://www.fedcourt.gov.au/about/national-court-framework/allocations

Although, much of the cases heard in the Supreme Court these days are pertaining to public interest litigations, the court remains subordinate to the Constitution.[43] This is line with the established fact of our courts being constitutional courts. Article 145(1)[44] mandates the necessity of explicit rules for a sound judiciary. Clause (4) of Article 145 additionally lays emphasis on transparency.[45] This highlights that even though conventions are followed to fast track the process of justice, they should take the position of complementary guidelines to maintain composure of the court. The composition of a bench leads to speculation of the outcome and this needs to be kept at a minimum. The foremost responsibility of a judge is to abide by the Rule of Law and thereby abandon unconstitutional practices.

Much of the abuse by the CJI is due to the absence of clear directives. This, however, in no way allows for the CJI to indulge in arbitrary practices. The leading case of *Maneka Gandhi v. Union of India*,[46] held that even constitutional authorities must adhere to non-arbitrary practices as envisaged in Article 14 of the Indian Constitution.[47] Further, even Article 145 lays an emphasis on transparency under clause (4).[48] However, the Constitution gives the Chief Justice almost unrestricted power when it comes to allotment of cases. The letter drafted by the four senior-most judges of the SC opens a whole new world of public discourse and cannot be done away with. The author, however, have certain structural reforms in mind which they would like to express. To inculcate these into the system will require resources and time. However, in the long run these will allow the judiciary to keep up with its most important objective, i.e. serving justice in a swift and accurate manner.

First, the formula used to create rosters should be dissipated to the public in order to make it a transparent and informative process. The scheme of enlistment must be either put up on the official SC website or through other widely available media. A system may be generated for the listing of matters to be made online automatically as per the list of filing. The present ambiguity as to how a particular subject matter is assigned to a judge has caused a lot of confusion in the country. Each judge's specialisation should be kept as record along with the sub-topics and matters should be allotted to a judge based on his specialisation and knowledge of the area of law to be dealt in the case.

Second, assuming that the present allotment is based on the personal choices of the CJI, we would like to present a simple model on creation of a roster with minimal influence and bias. The rosters must not only enlist the names of the presiding judges, but also the entire composition of the bench along with substitute judges in case a particular judge is unavailable at the time due to unforeseen circumstances. To create such a roster will require a team of highly proficient judicial member. The criteria for selection of panels must not

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[43] Alok Prasanna Kumar, *Crises in the Judiciary: Restoring Order in the Courts*, 53 ECONOMIC & POLITICAL WEEKLY (ISSUE 3) 10 (Jan. 20, 2018).
[44] INDIA CONST. art. 145.
[45] V.N. SHUKLA, CONSTITUTION OF INDIA 568 (12th ed. 2016).
[46] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[47] Justice GC Bhakuria, *Master of Roster – Constitutional Limitation and Way Forward,* LIVE LAW, http://www.livelaw.in/master-of-roster-constitutional-limitation-way-forward/#_ftn3, (last accessed on 03.03.2023 at 10:43 P.M.)
[48] INDIA CONST. art. 145.

only be based on seniority of judges, other attributes such as knowledge of a specific area of law should also be given significant consideration. This roster must be prepared by the CJI and a collegium of four senior most judges through a voting system. The presence of a five-judge panel will lead to engagement and varied opinions which are a better option than a one-man tyranny. The allocation of matters to judge(s) need not be a strict consensus of the collegium but can also be based on the majority view.

As, the negative to part of this suggestion has already been given in cases by Hon'ble SC, the author suggests that in its judicial capacity reconsider the findings of the Court and may the Supreme Court Rules, 2013 be amended to include CJI as well as the four Senior most judges to allocate benches to judges for hearing of matters.

Concluding Observations:

Power corrupts but absolute power corrupts absolutely. In administrative affairs, it has been observed that centralisation of powers has always proved to be detrimental. Judiciary being a beacon of diligence and *sentinel on qui vive* has greater responsibilities. The concept of Master of the Roster has been outdated and the current democratic scenario of the country demands decentralisation and more inclusiveness. The authority of CJI in deciding the roster should be of no exception, hence, necessary provisions should be enacted to decentralise the authority to promote independence of the judiciary.

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REGULATORY AND JUDICIAL STRATEGIES FOR MITIGATION OF HUMAN WILDLIFE CONFLICT: A STUDY WITH EMPHASIS TO WILDLIFE PROTECTION ACT, 1972

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Abstract: The coexistence of wildlife and humans has historically been harmonious, but contemporary challenges have escalated human-wildlife conflicts (HWC) globally. Recognizing the urgency, laws have been established both internationally and nationally to mitigate such conflicts and promote harmonious coexistence. This study delves into the Wildlife Protection Act of 1972, a pivotal legal framework in India addressing HWC, to assess its efficacy in curbing the same. Through a meticulous analysis of existing legal and judicial strategies, the paper evaluates the balance between wildlife conservation and human developmental needs. The findings illuminate the Act's strengths, and potential areas for enhancement, to provide insights for crafting more holistic approaches to HWC mitigation.

Key words: Human-wildlife conflict, Wildlife Protection Act 1972, wildlife conservation & Co-existence.

Introduction:

Since early times, wildlife has co-existed with human life with limited conflict in the different parts of the world. But in the recent times this conflict has grown immensely, mainly due to the change in the global climatic conditions, growing developmental activities and projects, pressure on natural resources, increasing livestock and human population, change in socio-economic and land use patterns[1]. Human wildlife conflict has become a direct threat to the safety, wellbeing and livelihood of the people. There exist great challenges in addressing Human Wildlife Conflict in particular because of the underlying cultural, political and economic factors that shape human wildlife conflicts which are often very complex and lack proper understanding. Law have evolved both at international and national levels to advert, reduce and manage the conflict and to foster co-existence between humans and wildlife. This paper examine the existing legal frameworks for protection of wildlife and look into how far these existing legal frameworks contribute to the prevention of HWC. This research paper analyse the existing legal framework and judicial policies in an attempt to ensure a comprehensive legal framework for integrating wildlife conservation with human developmental needs. The paper also probes to see how far this existing legal framework provides for an effective resolution and management of this conflict.

Understanding Human Wildlife Conflict:

Human Wildlife Conflict is becoming a serious threat to many endangered species of wildlife. Such conflicts arise when animals pose a serious threat to the security, livelihood and wellbeing of people necessitating persecution of such animals. Human-wildlife conflict occurs when encounters between humans and wildlife lead to negative results, such as loss of property,

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[1] See generally: Eva M. Gross, Ashley Brooks & Rohan Wadhwa, A Future for all: The need for Human Wildlife Co-existence, (WWF and UNEP 2021)

livelihoods, and even life[2]. It also adversely affects wildlife population and also makes a greater impact on the environment, tilting the equilibrium of the ecosystem and its biodiversity. Addressing Human-Wildlife Conflict on a global scale presents significant challenges, primarily due to the intricate and often misunderstood cultural, political, and economic factors that influence these conflicts. In a latest report made by the parliamentary standing committee to analyse the amendments proposed to the Wildlife Protection Act, 1972, the committee observed that Human Animal Conflict is a complex problem that needs to be addressed by Legislature for its effective management[3].

Implications of Human Wildlife Conflict:

Human Wildlife Conflict makes adverse impact on the environment. It causes loss for both humanity and also for wildlife. While human animal conflict causes injury, death and loss to property, wildlife and adjacent communities bear the brunt of human-wildlife conflicts. Such conflicts can lead to species depletion or even extinction, while communities face economic setbacks, health and safety risks, challenges to their livelihoods, food security issues, and property damage. HWC can be reasons for destruction of habitats and extinction of species for the wildlife. Defensive and retaliatory actions could ultimately lead these species to extinction. Such interactions cause immediate distress to both humans and the wildlife directly involved in the conflict. However, the issue of human-wildlife conflict extends its effects beyond just the wildlife and communities directly involved[4]. Their repercussions can resonate globally, affecting entities like sustainable development organizations and businesses. And in the long run the implications of HWC are felt around the world. Human-wildlife conflict emerges not only as a conservation challenge but also as a developmental and humanitarian issue, especially impacting farmers, herders, and artisanal fishers, especially those living below the poverty threshold. Beyond the immediate community losses, this conflict exerts indirect effects on a global scale by straining the supply chain and agricultural production, culminating in food insecurity and reduced productivity for producers worldwide.

Global Spotlights on Human Wildlife Conflict:

The 2004 World Parks Congress by the International Union for Conservation of Nature (IUCN) in Durban, South Africa, marked the first global spotlight on the issue of Human-Wildlife Conflict (HWC). Later the growing challenges of Human-Wildlife Conflict (HWC) in protected areas prompted the need for studies to come out with recommendations for governments, institutions, and organizations. These suggestions advocated for enhanced HWC management via the creation of national forums, capacity building, fostering national and international collaborations, and securing both national and

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[2] WWF, "What is human-wildlife conflict and why is it more than just a conservation concern?" *Available at*: https://www.worldwildlife.org/stories/what-is-human-wildlife-conflict-and-why-is-it-more-than-just-a-conservationconcern#:~:text=Human%2Dwildlife%20conflict%20is%20when,drive%20these%20species%20to%20extinction.

[3]Mayank Aggarwal, "Mechanism to deal with human-animal conflict needs legislative backin, says parliamentary panel", 2012 Mongabay.

[4] Eva M. Gross, Ashley Brooks & Rohan Wadhwa, Report on A Future for all: The need for Human Wildlife Co-existence, (*WWF and UNEP.2021)*

international funding.[5] Different groups for protection of environment and wildlife like IUCN prompted studies in to efforts for management of Human Wildlife Conflict and measures to gain momentum for international and nations funding and co-operation. IUCN took a lead role in this regard by promoting species specific studies aimed at management of Human Wildlife Conflicts. With gaining experience with incidents and related studies in to Human wildlife Conflicts, it came to be recognised that more effective methods of resolving such conflicts through capacity trainings and participatory methods involving people in avoidance and resolution of such conflicts. The necessity to remain informed about the possibilities of HWC and more focussed efforts to address them through more organised efforts at local, regional and national gained momentum.[6] Specific task forces and bodies came to be established to roll down tasks of IUCN in this regard[7].

Recent efforts also include measures to develop IUCN- HWC guidelines and a HWC standard, led by Griffith University with support of Luc Hoffmann Institute to adopt new conservation models such as 'Convivial Conservation' which place human-nature coexistence at the centre of all HWC resolution models. IUCN has also come out with the Guidelines to guide understanding and resolution of human-wildlife conflict. These Guidelines aim to provide foundations and principles for good practice, with clear and practical tactics to deal with conflicts while ensuring coexistence with wildlife. Most effective part of these guidelines is that these guidelines present a general nature and is not specie specific or limits to any particular Region and is truly universal in character.[8]

Human Wildlife Conflict to Co-existence: Global Regulatory Drivers:

Human-Wildlife Conflict and coexistence have gained importance and are predominantly found within national and regional frameworks. But international Conventions and frameworks seldom is seen to have integrated this policy. Presently international measures tend to address a wide range of impediments to conservation of wildlife which are relevant to HWC like trafficking in wildlife, habitat loss etc. Existing legal frameworks that address protection of wildlife are also relevant for the mitigation of Human Wildlife Conflict. There are certain international agreements, guidelines, protocols, institutions and national legislations and strategies which are relevant for mitigation of Human Wildlife Conflict. They are:

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[5] Madden F. "Preventing and Mitigating Human–Wildlife Conflicts: World Parks Congress Recommendation" Vol. 9(4) *2004, Human Dimensions of Wildlife*,.259-60.

[6] Madden F., McQuinn B., "Conservation conflict transformation: the missing link in conservation. In: Conflicts in Conservation: Navigating Towards Solutions". J.C. Young, K.A. Wood, R.J. Gutiérrez, S.M. Redpath , *Ecological Reviews* (Cambridge Publications 2015) 257-70.

[7] Eva M. Gross, Ashley Brooks & Rohan Wadhwa, "Report on A Future for all: The need for Human Wildlife Co-existence", (WWF and UNEP,2021) p.20.

[8] IUCN SSC guidelines on human-wildlife conflict and coexistence. First edn. Gland, Switzerland: IUCN

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973[9]:

CITES Convention represents the earliest measures adopted by the international community in 1973. The Convention was initiated with the active involvement of IUCN to regulate and prevent illegal trade in Wildlife[10]. The Convention is aimed at ensuring that international trade not threaten the survival of wild animals and plants. CITES regulates the international trade of certain species and employs different strategies to prevent illegal trade in endangered species by prescribing for a list of endangered species facing extinction and preventing their international commercial trade[11]. CITES establishes a framework for regulating and monitoring international trade in listed species. Parties to the convention are required to implement measures to ensure that trade in CITES-listed species is legal, sustainable, and traceable.

Even though the treaty does not specifically target prevention of Human Animal Conflict, it occupies an instrumental role in Prevention of Human Animal Conflict by regulating illegal trading, poaching and hunting of animals. By building in prohibitions on international trade of endangered species, the treaty contributes to the conservation of wildlife populations. Sustainable wildlife populations will to great extent mitigate possibilities of HAC by maintaining ecological balance and reducing such conflicts. By emphasizing enforcement and compliance by providing guidelines and recommendations for effective implementation member states are encouraged to strengthen through national legislation, enhance enforcement capacities, and co-operate with states to fight illegal trading in Wild life. Hence the efforts of CITES convention in preventing unsustainable trading in wildlife stands out as a progressive one to reduce HWC. A global follow-up and review of CITES Convention made in the 2017 High Level Political Forum (HLPF) on the work of the Convention on International Trade in Endangered Species of Wild Fauna and Flora reveals its shortcomings in tackling illegal trade in endangered species. At the same time, the fundamental policy underlying CITES also is in line with the mandate of 2030 Agenda for Sustainable Development Goals that specifically address illegal trafficking in wildlife through specific Targets under Goal 15[12].

Despite these developments, illicit trafficking of wildlife has evolved into a complex global criminal enterprise. Fuelled by increasing demand and often facilitated governance gaps, illegal trade in endangered species repeatedly involves organized crime syndicates and non-state armed entities which erode the rule of law, jeopardize and harm ecosystems. Exploitative tactics are used by violators by luring economically disadvantaged local communities into illicit harvesting, putting them at risk of encounters with dangerous wildlife or legal

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9 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

10 David Brown and Erin Swails, Comparative Case Study-Three- The Convention on International Trade in Endangered Species (CITES), *Available at*: https://www.researchgate.net/publication/242735304.

11 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973, Appendix III.

12 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *Available at* : https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=650&menu=3170

repercussions. This illegal wildlife trade severely hampers sustainable development initiatives and undermines the efforts of rural communities and indigenous groups striving for responsible natural resource management.[13]

Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention CMS), 1979:

The Bonn convention, signed in 1979, is another landmark treaty entered in to under the aegis of the United Nations Environment Programme. The Convention provides a global platform for the conservation and sustainable use of migratory animals and their habitats.[14] While the primary focus of Bonn Convention is on the conservation of migratory species and their habitats, this international measure also indirectly addresses some aspects of Human-Wildlife Conflict (HWC) through its conservation initiatives and collaborative efforts. The significance of this Convention lies in its efforts to trigger adoption of seven legally binding agreements under the auspices of the Bonn Convention to promote protection of endangered species[15].

Through conservation of habitats essential for migratory species, the Convention contributes to maintaining ecological balance and reducing potential conflicts between humans and wildlife. This convention also prescribes prohibitions on illegal trade in listed and endangered species. Appendix I contains migratory species which are endangered or threatened with extinction. Appendix II contains migratory species of which the conservation status is unfavourable, as well as those which would significantly benefit from international agreements for their conservation and management. In addition to this, numerous working groups affiliated under the Convention address diverse threats to migratory species, including challenges like climate change and environmental pollution. Task forces focus on specific issues, such as the impact of energy production on migratory birds. Additionally, several projects target localized or regional concerns related to particular species. The significant contributions of non-governmental organizations (NGOs) are particularly noteworthy, as they often spearhead various initiatives under the convention's umbrella. Furthermore, the Bonn Convention allocates funding for localized projects aimed at safeguarding migratory species and recognizes exemplary initiatives through awards and incentives.

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[13] *Ibid.*

[14]Nicholas Sellheim & Jochen Schumacher, " Increasing the Effectiveness of the Bonn Convention on the Conservation of Migratory Species", 2022, *Research Gate Available at:* https://doi.org/10.1080/13880292.2022.2153461

[15] *Ibid.* See the Agreement on the Conservation of Albatrosses and Petrels (ACAP); the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS); the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA); the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS); the Agreement on the Conservation of Populations of European Bats (EUROBATS) the Agreement on the Conservation of Gorillas and their Habitats (Gorilla Agreement); and the Agreement on the Conservation of Seals in the Wadden Sea (Wadden Sea Seals).

Convention on Biological Diversity (CBD) 1992[16]:

The Convention, is a global effort to conserve biodiversity aimed at ensuring sustainable use of its components, and promote fair and equitable access and sharing of benefits arising from genetic resources. Though the convention primarily focus on conservation of bio resources, it also address allied aspects of Human-Wildlife Conflict (HWC) through its objectives and initiatives.[17] The various points at which Bio-diversity conservation and Human wildlife Conflict have intersect are CBD's focus on Ecosystem Conservation by preserving natural habitats. In fact, the Convention contributes towards reducing potential conflicts between humans and wildlife. Its mandate for Healthy and intact ecosystems will facilitate adequate resources and habitats for wildlife, thereby significantly reducing their interaction and conflict with humans. By insisting on sustainable resource management practices, the CBD also help to mitigate HWC.

Collaboration for Human-Wildlife Conflict Management: Contemporary Efforts:

The International Conference on Human-Wildlife Conflict and Coexistence was held in Oxford, the United Kingdom for effective management of human-wildlife interactions for prompting coexistence across countries. It was also prescribed in Target 4 of the Kunming-Montreal Global Biodiversity Framework agreed at the UN Biodiversity Conference in December 2022, since contemporary developments suggest for nurturing co-existence and management of such conflicts. The Kunming-Montreal Global Biodiversity Framework (GBF) adopted during the fifteenth meeting of the Conference of the Parties also support the achievement of the Sustainable Development Goals and builds on the Bio Diversity Convention's previous Strategic Plans, and lays down an ambitious path to achieve the worldwide vision of living in harmony with nature by 2050. The Kunming-Montreal Global Biodiversity Framework in fact adopted 23 action filled targets for immediate implementation in decade ending by 2030. Among these targets, Target -4 is a specific attempt to deal with the issue of Human Animal Conflict. While Target 4 prescribed for evolving urgent management actions to halt human induced extinction of known threatened species and for their conservation, and take preventive measures to reduce their extinction as well as to maintain and restore the genetic diversity , specific reference is made to effectively manage human-wildlife interactions so as to minimize human-wildlife conflict for ensuring their coexistence .

Legal Framework for Human-Wildlife Conflict in India:

During early 20th Century, issues of Human-Wildlife Conflict, was relatively rare. However, changing climatic patterns, developmental activities, and habitat encroachments have exacerbated this issue over time. These conservation efforts are primarily focused on both in-situ and ex-situ conservation strategies, aiming to mitigate conflicts and ensure sustainable coexistence.

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[16]Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

[17] See also G. Kristin Rosendal, "Theoretical Background and Analytical Approach- The Convention on Biological Diversity — Regime Formation and Implementation in The Convention on Biological Diversity and Developing Countries", (Springer 2000)

Wild Life Protection Act, 1972 and Human Wildlife Conflict:

In India the epitome of Wild life protection and avoidance of Human Animal Conflict is the Wild life Protection Act of 1972. The Act contains many provisions to protect wildlife and conserve their habitats which serves a pivotal role in prevention of Human Animal Conflict. The Act envisage a comprehensive scheme for protecting wildlife by prohibiting hunting, protection and management of wildlife habitats, establishment of protected areas, regulating trade in products made of wildlife, and different categories of protected and reserved areas. It also present an array of offences and punishments which in effect contribute to amelioration of Human Wildlife Conflict.[18]

Avoidance of HWC through Establishment of National Parks, Sanctuaries and Zoos:

Under the Wildlife Protection Act (1972) of India, government can designate area as national Park and maintain it for the conservation and protection of wildlife and their habitats.[19] These parks are strictly protected areas where activities such as hunting, grazing, and developmental projects are prohibited to ensure the preservation of the ecosystem and biodiversity. National parks play a crucial role in maintaining ecological balance, preserving endangered species, and promoting environmental education and research. Visitation and tourism are allowed in some national parks under regulated conditions to generate awareness and appreciation for wildlife conservation while minimizing human-wildlife conflicts.

Sanctuaries are also designated under the Act for the conservation and protection of wildlife and their habitats.[20] Unlike national parks, sanctuaries permit certain activities and human interventions, subject to regulations, to ensure the sustainable co-existence of wildlife and local communities. The emphasis given to co-existence of wildlife and local communities by allowing grazing and collection of minor forest produce by local communities under controlled conditions is a step in the direction of fostering harmonious relationships between humans and wildlife.. Sanctuaries serve as important habitats for various species of flora and fauna, providing a refuge for wildlife to thrive and promoting biodiversity conservation. There are also arrangements under the Act to establish Zoos to prevent human-animal conflicts by promoting conservation education, conducting research and conservation initiatives, supporting local communities, providing rescue and rehabilitation services, and advocating for wildlife-friendly policies and practices[21].

Under the Wildlife Protection Act, 1972 of India, zoos are regulated institutions that house and display wild animals for conservation, education, and research purposes. The Act mandates that zoos must adhere to specific guidelines and standards to ensure the welfare and well-being of the animals. Zoos play a crucial role in wildlife conservation by participating in breeding programs for endangered species, conducting research on animal behaviour and biology, and raising awareness about wildlife conservation among the public.

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[18] See Wildlife Protection Act, 1972 , Schedule I to VI.
[19] Wildlife Protection Act, Section 35.
[20] *Ibid* section 26A
[21] Wildlife Protection Act, 1972, Section 38H

The Act aims to prevent cruelty and exploitation of animals in zoos and promotes ethical practices in their management and care. Zoos are required to obtain necessary permissions and licenses from the authorities and comply with the stipulated norms to operate legally under the Act.

Community Reserves and Conservation Reserves under Wildlife Protection (Amendment) Act, 2002: A New Dimension to avoidance of HWC:

The amendment to the Wildlife Protection Act, 1972 introduced two new categories. These new categories were brought to support conservation efforts by people on private, community lands or government land. The legislature felt that the already established protection of wildlife habitats by designation of sanctuaries and national parks did not envisage the participation of local inhabitants in the task of protection of wildlife. So under the newly added provisions viz., 36 A to 36 D, State Government is authorised to declare and designate with the consent of local communities any area owned by the Government, particularly the areas adjacent to National Parks and Sanctuaries and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat. to conserve wildlife and its habitat, declare any private or community land not comprised within a National Park, sanctuary or a conservation reserve, as a community reserve to conserve wildlife and its habitat, and declare any private or community land not comprised within a National Park, sanctuary or a conservation reserve, as a community reserve.

The Act also envisages for creation of Community/ Conservation Reserve Management Committee with the mandate to advise the Chief Wildlife Warden regarding the conservation of the area and effective participation and involvement of Village panchayaths for conserving, maintaining and managing these reserves. The initiative under 2002 amendment to Wildlife Protection act, 1972 have a laudable object and have tried to combine different kinds of conservation efforts, voluntary conservation efforts on private lands, on the lands of the institutions and those on community lands. On the one hand, efforts to involve local communities in wildlife management have faced challenges. Conversely, legislators have been hesitant to guarantee sufficient representation of indigenous and local communities in the decision-making process.[22] Though lack of clarity in the procedural aspects and role of community involvement has been criticised severely[23] these provisions are expected to advance legislative goals towards prevention and management of human animal conflicts.

The Act also provides for setting up of various protected zones for conservation of wildlife habitats, Community and conservation Reserves, Sanctuaries, National Parks, and Zoos. The MOEF&CC has also come up with several projects and studies for conservation of wild animal species to give effect to the broader schemes laid down under the Wildlife Protection Act, 1972. The

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[22] Krishnayan Sen, "Wildlife Protection: Scope of Community Participation in New Act", Vol. 39, No. 7, 2004 *Economic and Political Weekly* 623-625

[23] Neema Pathak and Shantha Bhushan, "Community Reserves And Conservation Reserves: More Reserve
And Less Community", *Available at* : https://kalpavriksh.org/wp-content/uploads/2018/07/CommunityReservesandConservationReservesON-RESERVES_HinduMarch2004.pdf

primary objective underlying these measures seems to preserve species within their natural environments, allowing them to coexist harmoniously without encountering conflicts.

Recently, the Central Empowered Committee (CEC), mandated by the Supreme Court of India, issued a report to the Ministry of Environment, Forest and Climate Change (MoEFCC) recommending a review of the guidelines under the Forest (Conservation) Act of 1980 and the Wildlife (Protection) Act of 1972.[24] These guidelines currently prohibit the establishment of zoos and safaris within tiger reserves and wildlife sanctuaries and also discourage tourism in these natural habitats. These efforts primarily aim to preserve species within their native environments, allowing them to co-exist harmoniously without confrontations. But lack of enforcement of such conservation measures will help to alleviate the increasing instances of human-wildlife conflict.[25]

Wild Life Protection (Amendment) Act, 2022:

The Union Ministry of Environment, Forest & Climate change has amended the Wildlife Protection Act, 1972 in 2022. But the Amendment does not contain any specific provisions to deal with the issue of human-animal conflict, which was a burning issue around the time of adoption of the amendment. The Parliamentary Standing Committee appointed to anlayse and review the Act. The panel had asked the Union Ministry to consider constitution of a human-animal conflict management advisory committee with the Chief Wildlife Warden of the state as its chairperson, and an officer of the state police department (not below the rank of an Inspector General in charge of Law & Order) as its vice-chairperson[26]. The panel also made suggestions to include two eminent wildlife ecologists with specific expertise in human-wildlife conflict solutions, a wildlife veterinarian with specific expertise in chemical immobilisation and translocation of conflict-prone species, a representative of a non-governmental organisation with experience in mitigation of human-wildlife conflict and a sociologist with experience in mitigation of human-animal conflict as it members.[27]

Human-Wildlife Conflict: Judicial Perspectives:

Judiciary has been actively supervising and monitoring the conservation strategies adopted under the Wildlife Protection Act and closely scrutinising exercise of duties by functionaries under the Act. In a case filed by the People for Cattle in India (PFCI), a trust which is said to be actively involved in protecting and preserving environment and wildlife based on a newspaper report published in The Hindu dated 02.07.2020 under the caption "Elephant shot dead near Mettupalayam" attracted attention of court to recurring deaths of elephants and

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[24] Ajay Kumar Rana & Nishant Kumar, Current wildlife crime (Indian scenario): Major challenges and prevention approaches , Volume 32, 2023 *Biodiversity And Conservation*, 1473–1491, . Available at https://link.springer.com/article/10.1007/s10531-023-02577-z

[25] Cui Q, Ren Y, Xu H (2021) The escalating effects of wildlife tourism on human-wildlife conflict. Anim (Basel) 11:5. https://doi.org/10.3390/ani11051378

[26]Mayank Aggarwal, Mechanism to deal with human-animal conflict needs legislative Backing, says parliamentary panel , 2022 Mongabay, Available at : https://india.mongabay.com/2022/05/mechanism-to-deal-with-human-animal-conflict-needs-legislative-backing-says-parliamentary-panel/

[27] Ibid

human animal conflicts and also loss of livelihood of people of the locality. The court appointed a Committee under chairmanship of Chief conservator of Forests to conduct a study in to deaths of elephants.[28]In this case the NGT was probing all governmental initiatives for avoidance of Human –Elephant Conflict. NGT ordered the governments of Tamil Nadu and Kerala to explore the use of Artificial Intelligence for alerting train operators about the presence of elephants and other wildlife to prevent collisions. They were instructed to hold regular meetings to enhance existing methods or develop new ones if current systems prove ineffective. Awareness programs for train staff on mitigation techniques and guidelines from the Central Monitoring Committee and Wildlife Institute of India were mandated. Forest Departments were tasked with forming teams to educate villagers in conflict-prone areas about driving away wild animals effectively[29].

Another instance of Human–elephant Conflict was reported in the New Indian Express article dated 03.06.2020 which highlighted a tragic incident involving an elephant in Kerala. The newspaper report prompted the Honourable National Green Tribunal to intervene and address the broader issue of wildlife protection and human-animal conflicts[30]. The Tribunal actively intervened by directing the formation of a joint committee, comprising senior officials including the Chief Conservator of Forests, Chief Wildlife Warden of Kerala, representatives from the Wildlife Crime Control Bureau's Southern Zone, as well as officials from specific wildlife divisions and the Palakkad District Collector. This committee was tasked with investigating the incident, submitting a comprehensive report on the actions taken, and devising a long-term management plan to prevent similar incidents in the future including use of Unmanned aerial vehicles (drones) to mitigate Man-animal conflict mitigations.

Man-animal conflict was also addressed by the Supreme Court of India in *Godavarman case* in 2012.[31] Conflicts between humans and animals frequently arise when wildlife damages crops, property, and livestock, posing risks to human lives. Taking account of these facts the honourable Supreme Court observed that both the Central and State Governments, along with Union Territories, need to develop enhanced conservation strategies in collaboration with Wildlife Boards to significantly mitigate such conflicts.

The Uttarakhand High Court has very recently made serious intervention into a Human wildlife conflict incident which involved a predatory beast's atrocity against a women. The court instructed the installation of cameras to identify the predatory beast, the use of cages for its capture, and, if necessary, tranquilisation and relocation to a rescue centre. In this instance the court intervened with the order issued by chief Wildlife Warden's directive ordering immediate extermination of the man eater and ordered that killing a predatory animal should be a last resort. The honourable court observed that a well-thought-out decision of the chief wildlife warden rather than succumbing to public agitation is the need of the time in tune with current need for a

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[28] People for Cattle in India (PFCI) v. Additional Principal Chief Conservator of Forests Coimbatore Circle NGT Original Application No. 157 of 2020 (2022)

[29] *Ibid.*

[30] National Green Tribunal Southern Railway vs Ministry Of Environment Forest NGT-Chennai Zone, OA 77 of 2020, decided June, 2021

[31] T.N. Godavarman Thirumulpad vs Union Of India & Ors on 13 February, 2012

progressive approach to ensure balancing of interests and ensure co-existence. The High Court also criticised the forest department for bypassing the investigative process mandated by Section 11A of the Wildlife Protection Act and questioned the immediate decision to kill without identifying the species[32].

Jayashankar Abbaiah v. The District Collector is another case where Madras High Court addressed the issue of destruction of elephant habitat can worsen human –elephant conflicts. According to the petitioner, lands in Kammandoddi village, which were offered for auction falls in the elephant corridor and if quarrying is allowed for after auction it would result in fragmentation of landscape amounting to destruction of elephant habitat and will increase man-animal conflict. The Court thereby ordered that the Collector would only declare that land has been designated so once it has been determined that there won't be any conflicts between humans and animals or negative effects on the ecology.

Compensation for Victims of Human Wildlife Conflict:

Compensation for victims of human-wildlife conflict serves as a critical tool in mitigating conflict and promoting coexistence. Considering that there is need to treat human-animal conflict issue not as an isolated one but within the context of farmer's social-economic lives, efforts to provide Compensation to victims of HWC was also placed before Indian parliament in 2021. The Payment of Compensation to Victims of Wildlife Encounters Bill, 2021[33] made an abortive attempt to provide compensation for victims when wild animals attack farmers, their livestock, and cause damages to their agriculture crops and other properties. The Bill prescribed for evolving effective mechanisms to ensure payment of compensation to the victims of wildlife encounters without delay and hassles. But unfortunately the Bill did not receive the assent of parliament to become a law. Later in 2022 also another Bill was introduced to bring legislatures attention to this issue viz., the Payment of Compensation to Victims of Attack By Wild Animals Bill, 2022[34] to provide for compensation to the victims of attack by wild animals and for matters connected therewith. But both the Bills did not become law. In the absence of legislative mandate there is lack of guidelines to deal with Compensation for victims.

Compensation to Victims of Human Animal Conflict: Judicial Policy

The Judicial attitude towards compensation for victims of Human Animal Conflict has been favourable. *In Balaji Bhujang Khansole v The State of Maharashtra and another*[35] the Petitioner therein was denied benefits under Government Resolution dated 2nd July 2010. In this case Petitioner had prayed for compensation for death of his wife due who was attacked by a wild boar. In this case the forest authorities denied compensation to legal representatives of

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[32] The Times of India, December 15, 2022.

[33] The Payment of Compensation to Victims of Wildlife Encounters Bill, 2021 *Available at* :
https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/48%20of%202021%20AS.pdf?source=legislation

[34] See https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/71%20of%202022%20as%20introduced.pdf?source=legislation

[35] Writ Petition No. 1052 of 2017 decided on 4th June 2019.

the deceased stating that the incident leading to the death was not reported within three days time as specified in the government resolution. But court allowed the Petition and directed the Respondent authorities to take steps to give benefit of the Government Resolution referred to therein to the Petitioner.

In a case with similar facts, a petition was filed by petitioner-wife calling up on the court to quash and set aside a communication issued by Respondent 2-Regional Forest Officer by which the request for compensation was rejected and seeks further directions against the Respondents to pay compensation to the Petitioner as per Government Resolution dated 11-07-2018, on account of death of her husband due to attack by wild Boar, The Hon'ble Court has instructed the State to compensate the Petitioner with a sum of Rs10 lakhs, to be disbursed within three months from today, in accordance with the Government Resolution dated 11-07-2018. Additionally, the Court has ordered the payment to include 6% interest, calculated from three months after the date of the Petitioner's application until the actual disbursement of the amount. The Court remarked "it is a twin obligation of the State Government. The first is to protect wildlife (wild animals) and the second is to protect humans from any injuries caused by any wild animal. It is thus an obligation of the State Government to protect lives of the citizens guaranteed under Article 21 of the Constitution of India." Thus, if any wild animal causes injury to any person, this in fact is a failure of the State Government to protect right to life guaranteed under Article 21 of the Constitution of India.[36]

The Wild Life (Protection) Amendment Bill, 2021 was introduced in the parliament in December 2021 by the Union Ministry of Environment, Forest and Climate Change (MoEFCC) following which it was referred to the standing committee. In its report on April 21, 2022, the committee noted that the bill "does not contain any specific provisions to deal with the concerns raised by members of the Committee on the issue of human-animal conflict which, in many ways, reflects on the success of conservation and protection programmes for which India has been a pioneer and has emerged as a world leader."

The panel asked the union environment ministry to consider inserting a section for the constitution of a human-animal conflict management advisory committee with the Chief Wildlife Warden of the state as its chairperson, and an officer of the state police department (not below the rank of an Inspector General in charge of Law & Order) as its vice-chairperson. It suggested the inclusion of two eminent wildlife ecologists with specific expertise in human-wildlife conflict solutions, a wildlife veterinarian with specific expertise in chemical immobilisation and translocation of conflict-prone species, a representative of a non-governmental organisation with experience in mitigation of human-wildlife conflict and a sociologist with experience in mitigation of human-animal conflict as it members.

The panel said that the advisory committee shall assess the extent of human-animal conflict and finalise an adaptive action plan covering all aspects including equipment, trained personnel, advice on quantum of compensation to affected people, site-specific plans including the creation of viable wildlife corridors to ensure long-term resolution of conflict, Standard Operating

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[36] *Anuja Arun Redij v. The State of Maharashtra*, 2022 SCC OnLine Bom 2871.dochttps://www.livelaw.in/pdf_upload/boar-attack-436670.pdf

Procedures including prescription of scientific capture, translocation and population management techniques based on best practices.

Concluding Observations:

As our world's population density rises, human-wildlife conflicts are inevitable; yet, with strategic and comprehensive management, these conflicts can be mitigated over time. Adopting well-thought-out approaches to human-wildlife conflict management can yield advantages for biodiversity, affected communities, and broader societal, economic, and sustainable development goals. We urge international collaboration, unified efforts, and adequate resources to tackle this issue effectively on a global scale.

The escalating Human-Wildlife Conflict (HWC) presents a pressing challenge, demanding a thorough examination of the existing legal and judicial strategies to ensure effective mitigation. While wildlife has historically coexisted with human societies, contemporary challenges such as climatic shifts, rapid development, and socio-economic transformations have intensified these conflicts. The Wildlife Protection Act of 1972 stands as a cornerstone in India's legal framework, aiming to safeguard wildlife and facilitate coexistence. However, the multifaceted nature of HWC, influenced by intricate cultural, political, and economic dynamics, calls for a nuanced and adaptive legal approach. This study reiterates the need for a comprehensive legal framework that not only protects wildlife but also harmonizes with human developmental imperatives. It is imperative to bridge the gaps in the existing legal mechanisms, fostering collaborative efforts between stakeholders and initiating innovative solutions to ensure the sustainable coexistence of humans and wildlife. By enhancing legal clarity, inclusivity, and effectiveness, we can strive towards a future where both humans and wildlife thrive in harmony, safeguarding biodiversity and livelihoods alike. The Judiciary should also rise in solidarity with the emerging trends and promote co-existence of humans and wildlife.

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CONCEPT OF PUBLIC PURPOSE: ITS IMPORTANCE AND USEFULNESS IN THE PRESENT SCENARIO

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Abstract: The concept of 'public purpose' is inclusive and not precisely defined in the Act or the constitution of India, which makes it possible for the government to stretch the public purpose definition to its limit and even including acquisition of land for non-profit making private companies. Based on the analysis of the present research work it can be held that the judiciary play's important role in defining the public purpose and keeping a regular check on the misuse of power vested with the state government to acquire land for the public purpose. In spite of judicial interventions and directions, the power of land acquisition in the name of public purpose has been grossly misused by the states. Even the new Act (Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013) has also failed to be a good replacement of the old Land Acquisition Act, 1894 to address the misuse. The role and power of the government as the sole authority in deciding public purpose should be reduced and role of the judiciary to protect the interest of the person whose land is acquired should be increased.

Keywords: Land Acquisition, Public purpose, Eminent Domain, Land Laws.

Introduction:

It has always been recognized that the power of eminent domain is an essential attribute of sovereignty. This power connotes the legal capacity of the state to take the private property of individuals for public purposes.[1] The importance of the power of eminent domain to the life of the state need hardly be emphasis. It is so often necessary for the performance of governmental functions to take private property for public use. The power is inalienable it is based on the two maxims that (1) saluspopuliest supreme lex i.e., the interest and claim of the whole community is always superior (2) Necessitapublic major est quam private i.e., public necessity is greater than private interest and claim of an individual. The power of eminent domain has three essential attribute of sovereignty. First, the power of the state to take over private land; second, this power is to be exercised for public ground; and third, it is obligation on the State to compensate those whose lands are taken over. Essentially it deals with power of the state to expropriate lands of individuals who, are not willing sellers, it is based on the principle that interests of the whole community is greater than individual interest. Thus property may be needed and acquired under this power for government offices, libraries, slum clearance projects, public schools, college and universities, public highways, public parks, railways, telephone and telegraph lines, dams, drainage, severs and water systems and many other projects of public interest convenience and welfare.[2]

Interpretation of Article 300A of Indian Constitution:

Article 31 of the Indian Constitution deals with the eminent domain power and clauses (1) and (2) of the article 31 lay down three limitations subjected to which state may exercise its eminent power. Article 31 guarantees

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[1] United States v. Jones, (1883) 27 Ed 105, 107

[2] V.N. Shukla's 'Constitutional Law of India', (Mahendra P. Singh, rev'd. Eastern Book Company,12th ed. 2008) pp 298-99.

that a person cannot be deprived of his property by an executive order (property right can be deprived only through legislation). Secondly, such deprivation can only be for public purpose and thirdly, compensation for deprived property must be equivalent to the market value of the property acquired. The word compensation used in Article 31(2) created a lot of problem; it has been discussed in the previous chapter. Even though government has sovereign power to acquire land, the word compensation used in the Article31 created lot of obstruction to the government. When Government sought to acquire land for public purpose, immediately land owner were initiating and filing a writ petition either before the Supreme Court under Article 32 or before High Court under article 226, it was great hurdle for the government. Hence, to overcome the hurdles, there were series of amendments brought to the Constitution and finally in 1974 by forty-fourth amendment Articles 19(1) (f) and 31 were repealed and Article 300-A was inserted. Reason for the deletion of Articles 19(1)(f) and 31 and insertion of 300A is that to reduce the property right from the status of fundamental right and make it as a legal right(property right will be available against executive interference, but not against the legislative interference).[3] After 44th amendment Supreme Court has very clearly stated that the executive cannot deprive a person from his property without the authority of law and 'law' in this context "an Act of parliament or state legislature rule, or statutory order, having force of law, that is positive or State made law," in the view of interpretation given to the word 'Law' under Article 21 in *Maneka Gandhi v. Union of India*.[4]

Bombay High Court invalidated some provisions of the Maharashtra Housing and Area Development Act, 1976 under Article 300A ,accordingly the law was not just and fair in so for as it provided less compensation for the acquisition of property than provided under the Land Acquisition Act 1894[5]. According to the Bombay High Court, adequate compensation was an essential ingredient of 'Law' in article 300A and the law relating to the acquisition of property must satisfy Article 21 of Indian Constitution. The decision of the High Court was reversed by the Supreme Court and also been held that the state's power of eminent domain or to acquire property is subject to common law requirement (Doctrine eminent domain) of 'public purpose' and 'adequate compensation' but not subject to the right to livelihood under Article 21. Hence, state may acquire property notwithstanding the impact of acquisition on the owner's livelihood.

In *Gilubhai Nanbhai Khachar v. State of Gujarat*,[6] Supreme Court has however held that because of controversial aspects of Article 31, it was deleted from the Constitution and it should not be brought back by judicial interpretation. The court admitted the exercise of power of eminent domain recognized under Article 300A requires existence of public purpose and payment of money for the property acquired, amount need not be just equivalent to the property acquired but at the same time it must not be illusory if, in any case law fails to satisfy the requirements of 'public purpose' and 'adequate payment' it may held to be invalid under Article 300A. In this regard legislative decision shall be final, however, requisition and acquisition of property may still be

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[3] See paragraphs 3 & 5 of the statement of Objects & Reasons of the 44th amendment.
[4] (1978)1 SCC 248; AIR 1978 SC 597.
[5] Basantibai v. State of Maharashtra, AIR 1984 Bom.366.
[6] AIR 1986 SC.366.

challenged on the ground whether a piece of property acquired for public purpose or whether compensation paid is adequate or not.

Philosophy of Public Purpose:

Since independence land has been acquired from people, particularly from farmers, for the purpose of expanding towns/cities by converting agricultural land into non-agricultural land. This has been going on and still goes on at a slow pace. In the name of industrialization, larger portion of land has being acquired from people for 'public purpose' and 'development' and was later handed over to private companies. Currently, if the state acquires land on the ground of 'public interest' in a function of its eminent domain power, aggrieved parties have little judicial recourse. Indeed, several such challenges have already been dismissed by the Courts, including acquisitions for sewage treatment plant, planned development for housing scheme and for a co-operative society.

Enormous power available to the government under the doctrine eminent Domain (Land Acquisition Act) state has led to many blatant abuses. For example, the West Bengal Government acquired fertile agricultural lands in West Medinapur for Tata Mataliks in 1992, dispossessing small and marginal farmers, in preference to undulating waste land, that available nearly. Likewise in the case of the Century Textiles, the State Government acquired about 525 acres of land for a Pig Iron Plant in 1996. However, company later decided that Pig Iron production was no longer profitable and refused to pay the compensation. Singur in West Bengal is another recent example wherein government sought to acquire prime agricultural land for private capitalist parties, i.e., for Tata Motors. State governments have not hesitated to take over the land even by employing draconian emergency powers available under this Act.[7]The main philosophy behind the Act (Land Acquisition Act 1894) is eminent domain power or sovereign power of the state. The state may directly own lands through acquisition, purchase etc. or by default. That means all lands which are not privately owned by the individuals are owned by the state but in respect of privately owned lands the state has eminent domain power.

Origin of public purpose goes back to 1824 wherein the British colonial government codified this undisguised forcible seizure of law. The Bengal regulation 1 of 1824, based on the principle of 'eminent domain', which empower the state to take any private property for public use. This was extended to cover land acquisition for the railways in 1850 by the British regime. This draconian law unfortunately never defined the meaning of 'public purpose' and it was enough for the state to declare it so. After the Constitution came into force Article 372 of the Constitution allows all colonial laws continue to force unless repealed otherwise. There was an enormous increase in infrastructure building and industrial activities by the state during the period immediately after independence as compared to the colonial period. Number of dams, power plants, mines; steel and heavy engineering plants came up for which land is acquired by using the 1894 Act.

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[7] Rafi Ahmed, 'Land Right & the Eminent Domain', 58 Social Action 266 & 267 (July-Sept 2000).

Definition of Public Purpose:

The concept of 'public purpose' is one of the most entrenched issues in the legal field, what constitutes pubic purpose is an open question subject to interpretation and use.21 'Public purpose' is a condition for the exercise of state's power of compulsory acquisition of private property but no definition of the phrase 'public purpose' is given either under repealed Article 31(2), or under Article 300A or under repealed Land Acquisition Act 1894, nor any limitation prescribed. There are number of cases which have considered the word "public purpose" but none of them have proposed to lay down the definition or the extent of the expression.22 Black's law dictionary defines the word 'public purpose' as synonymous with governmental purpose. "A public purpose or public business" has for its objective to promote public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political division.[8]

Section (za)[9] "public purpose" means the activities specified under sub-section (1) of section 2; Section 2 of Land Acquisition Act, 2013, gives an inclusive definition of the phrase public purpose. The provisions of this Act relating to land acquisition, compensation, rehabilitation and resettlement, shall apply, when the appropriate Government acquires land for its own use, hold and control, including for Public Sector Undertakings and for public purpose, and shall include the following purposes, namely:— (a) for strategic purposes relating to naval, military, air force, and armed forces of the Union, including central paramilitary forces or any work vital to national security or defence of India or State police, safety of the people; or (b) for infrastructure projects, which includes the following, namely:— (i) all activities or items listed in the notification of the Government of India in the Department of Economic Affairs (Infrastructure Section) number 13/6/2009-INF, dated the 27th March, 2012, excluding private hospitals, private educational institutions and private hotels; (ii) projects involving agro-processing, supply of inputs to agriculture, warehousing, cold storage facilities, marketing infrastructure for agriculture and allied activities such as dairy, fisheries, and meat processing, set up or owned by the appropriate Government or by a farmers' cooperative or by an institution set up under a statute; (iii) project for industrial corridors or mining activities, national investment and manufacturing zones, as designated in the National Manufacturing Policy; (iv) project for water harvesting and water conservation structures, sanitation; (v) project for Government administered, Government aided educational and research schemes or institutions; (vi) project for sports, health care, tourism, transportation or space programme; (vii) any infrastructure facility as may be notified in this regard by the Central Government and after tabling of such notification in Parliament; (c) project for project affected families; (d) project for housing for such income groups, as may be specified from time to time by the appropriate Government; (e) project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker sections in rural and urban areas; (f) project for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by the Government, any local authority or a corporation owned or controlled by the State. (2) The

[8] Black's Law Dictionary 1247(7th ed., 1999).
[9] Land Acquisition Act, 2013

provisions of this Act relating to land acquisition, consent, compensation, rehabilitation and resettlement, shall also apply, when the appropriate Government acquires land for the following purposes, namely:— (a) for public private partnership projects, where the ownership of the land continues to vest with the Government, for public purpose as defined in sub-section (1); (b) for private companies for public purpose, as defined in sub-section (1): Provided that in the case of acquisition for— (i) private companies, the prior consent of at least eighty per cent, of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3; and (ii) public private partnership projects, the prior consent of at least seventy per cent. of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3, shall be obtained through a process as may be prescribed by the appropriate Government: Provided further that the process of obtaining the consent shall be carried out along with the Social Impact Assessment study referred to in section 4: Provided also that no land shall be transferred by way of acquisition, in the Scheduled Areas in contravention of any law (including any order or judgment of a court which has become final) relating to land transfer, prevailing in such Scheduled Areas. (3) The provisions relating to rehabilitation and resettlement under this Act shall apply in the cases where,— (a) a private company purchases land, equal to or more than such limits in rural areas or urban areas, as may be prescribed by the appropriate Government, through private negotiations with the owner of the land in accordance with the provisions of section 46; (b) a private company requests the appropriate Government for acquisition of a part of an area so prescribed for a public purpose: Provided that where a private company requests the appropriate Government for partial acquisition of land for public purpose, then, the rehabilitation and resettlement entitlements under the Second Schedule shall be applicable for the entire area which includes the land purchased by the private company and acquired by the Government for the project as a whole.

Evolution of Public Purpose in India:

The Bengal Regulation 1 of 1824[10] was the first piece of legislation regarding the acquisition of immovable property for public works and public purposes in British India. The Act was to ensure that the officers of the government are enabled to obtain land or other immovable property at a fair valuation for construction of roads, canals and other public purposes.[11] It was Act 1 of 1850 (1850 Act) which extended the provisions of the Regulation of 1824 to the then city of Calcutta. The objects of the Act were self-explanatory through the provision which states that any declaration made by the Governor of Bengal as to the purpose of the acquisition would be the conclusive evidence for establishing the declared purpose as public purpose." There were no guidelines on the basis of which the Governor had to decide whether it is for public purpose or not. It meant that, the Governor of Bengal had immense power to declare any purpose as public purpose.[12] The objective of the Act I of 1850 was mainly to

[10] Evolution of public purpose in India. This portion of the chapter has been extensively borrowed from the law commission of India, 10th report on the Law of Acquisition& Requisition of Land, (1958); Repealed by Act VI of 1868.Repealed by ActVI of 1868

[11] See Sections 2 to 8 of the Regulation 1 of 1824 of the Bengal Code.

[12] See Statement of objects & reasons of the Act 1 of 1850, quoted in V.G. Ramachandran, Law of Land Acquisition & Compensation 4(1972). It inter alia states: the powers & provisions of first seven sections of Regulation 1 of 1824 of the Bengal Code

confirm the title of the lands acquired.[13] The presumption that the purpose is public purpose upon such declaration by the Governor General-in-Council was once again emphasized in the Acts XX of 1852 and I of 1854 which were facilitated, the acquisition of land for public works and purposes in the then Presidency of Fort. St. George. The Building Act XXVIII of 1859 which extended the 1850 Act to the then Bombay and Colaba, enabled the authorities to acquire land for construction or widening of roads, streets, or drain ways and/or other thoroughfare. The Act XXII of 1863 authorised the Governor General-in-Council to declare projects dealing with irrigation, navigation, and improvement of docks and harbours as work of public utilities.[14] The preamble of the Land Acquisition Act, 1870 maintained that the acquisition of land would be for public purposes and for companies.

Since independence, the Land Acquisition Act, 1894 continued to be in force by virtue of Article 372 of the Constitution[15]with necessary modifications according to the provisions of the Constitution. The original Article 31(2) of the Constitution was clear in that context it stipulated that when and how private property could be acquired.[16] Though Article 31 of the Constitution of India has been repealed, the public purpose limitation has been read in by the Supreme Court as part of the right to property under Article 300A. Around this period, at least in three instances, the state enactments have introduced new meaning to the term public purpose. In 1949, Central Provinces and Berar was the first province to substitute a new clause for public purpose.

Concluding Observations:

Article 31(2) categorically states that a land can be acquired by the state only for public purpose. Broadly speaking, public purpose would include a purpose, in which the general interest of the community, as opposed to a particular interest of the individual, is generally and vitally concerned. In a generic sense the expression public purpose would include a purpose in which where even a fraction of the community would derive benefit or be benefited. Anything which is useful to the public in the sense that it confers some public benefits or conduces to some public advantage is a public purpose. With the march of civilisation, the notions as to the scope of the general interest of community changes and widens with result that old and narrower notions as to

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shall be applicable to all lands within the town of Calcutta which shall have been declared by the Governor of Bengal to be needed for any public purpose and such declaration shall be conclusive evidence that the purpose for which lands are needed is a public purpose (emphasis supplied).

[13] P.K. Sarkar, 'Law of Acquisition of Land in India', (Eastern Law House, New Delhi, 1st ed., 998), p 22.

[14] http://banglapedia.search.com.bd/ht/l_0039.htm

[15] Article 372: Continuance in force of existing laws and their adaptation. (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent authority.

[16] Article 31(2) provided that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which the manner in which the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by the law is not adequate.

sanctity of private interest or individual interest no longer steam the forward flowing tide of time and give way to broader notions of general interest of the community. It is the requirement of public purpose and it is determining factor on question of whether or not a particular land should be acquired and the considerations of hardships to the individuals cannot outweigh the question of public demand. Section 3(f) of the Land Acquisition Act defines "public purpose" as the expression was not strictly construed and it is an inclusive definition therefore, from time to time the Courts have held different purposes to be public purpose. It is not possible to give an exact and all-embracing definition of public purpose. The law of Land Acquisition jeopardises the private interest for public purpose. Hence, it denies an individual right to property. It overrides the right of a person to own a property, so the law in general should be strictly construed. The strict construction of the law of Land Acquisition has been emphasised by the Court for the last 64 years as it did not hold the person whose property has been taken. The owner of the property has no bargaining power with the state in such circumstances nor does he has say in compensation; so it is inevitable in the interest of equity that the law should be strictly improve to provides for various checks and balances. Compulsory acquisition will be effective only a humane, participative, informed and transparent process followed. Hence, Acquisition Act, 1894 is an inroad into citizens' right to property. On this matter the established law is that if for the purpose for which land is acquired, it is apparent on the face of acquisition, it is not a for a public purpose and there can be no two arguments to construe it otherwise, means the act of the government is ultra vires. Hence, public purpose is justifiable; Courts can be look into the matter. The Recognised legal definition of public purpose has given rise to scope for abuse of eminent domain. Public purpose clause needs substantial clarity therefore government proposed to amend Land Acquisition Act, 1894 even, the pure private property deal can be treated as public purpose provide for a stricter definition of public purpose. Therefore the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and resettlement Act, 2013 came into force. Under this Act word public purpose has been comprehensively defined, so that government intervention in acquisition is limited to defence certain development projects only. Except acquisition of land for government including public sector undertaking, an additional security shall require consent of 80 per cent of the project affected families in acquisition of land for private companies or for private-public partnership projects.

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LAW AND MORALITY IN MODERN INDIA: A CRITICAL ANALYSIS WITH RESPECT TO SAME SEX MARRIAGES

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Abstract: The Supreme Court has, in recent years, created its own vocabulary to discuss issues of privacy, freedom, and constitutional morality. As a result, several previously unrecognised rights, such as the right to privacy and the freedom to marry whoever one chooses, have become widely accepted. However, the Supreme Court provided a comprehensive definition of the right to intimate contacts in *Navtej Singh Johar v. Union of India*, which confirmed the decriminalisation of same-sex interactions. According to the paper, all the legal prerequisites for marriage equality–that is, the recognition of same-sex marriage on an equal basis with traditional opposite-sex marriage–already exist. Article argues that limiting marriage to 'one man, one woman' violates Articles 14 and 15 by discriminating against women. Article further claims that this definition is arbitrary. The article also acknowledges that the developing concept of constitutional morality can be used to disprove arguments that same-sex marriage violates the so-called sanctity of traditional opposite-sex marriage. This concept of constitutional morality is meant to interpret public morality as a restriction on fundamental rights, and it supersedes social or popular morality in doing so. In this paper, the connection between law and morality is studied, as is the degree to which the two are intertwined.
Keywords: Law, Morality, Natural Law, Right to Life, Same Sex Marriages.

Introduction:

While "morality" refers to a set of normative patterns that aim to promote good and discourage evil in individual and collective life, "law" refers to a rules and regulations enacted by the state and physical compulsion. When these laws are broken, the courts impose penalties that are meant to be symbolic of state policy. The government's ability to serve the people and keep its obligations to them is facilitated by the rule of law, which also serves as a bridge between competing political, social, and economic interests. The legal system is a reflection of the social and psychological requirements of society. Law and morality are two frameworks derived from a standard or norm that govern and control behaviour in mortal communities to foster peaceful and fruitful inter-subjectivity among people who respect one another's inherent dignity and inherent rights. Both ideas are grounded in people's inherent dignity and the freedom to make their own choices. For as long as there have been philosophers, intellectuals, jurists, judges, and social scientists, the link between law and morality has been the subject of endless speech, discussion, and controversy. Recent jurists, most notably Hart and Fuller and Hart and Devlin, have traced the lineage of legal thought from ancient China and India's Confucius and Manu and Buddha to ancient Greece and Rome's Socrates, Plato, and Aristotle. Jurists have pondered the nature and purpose of law and morality and their interrelationship by asking if morality is inherent in law or whether law is devoid of it. While both law and morality govern and regulate human conduct to some extent in every society, from the most primitive to the most advanced, the debate over how they relate to one another demonstrates that neither is sufficient on its own to maintain social order; rather, law and morality are inseparable, indispensable, and mutually reinforcing.[1]

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[1] S.N. Dhyani, *Law-Morality and Justice: Indian Development*. (New Delhi: Metropolitan Book Co. (P) Ltd. 1984) at p. 6.

Lawmakers and judges do not create laws and decisions in isolation. Their choices are shaped by societal standards. Legislators and judges create legal concepts in accordance with prevailing cultural beliefs. Values go beyond potential legislation materials in many ways. They can be used to evaluate the merits of a proposed law. By its very nature, judicial decision making is influenced by moral and value considerations.

Marriages between people of the same sex are called same-sex marriages. There are continuous efforts to get same-sex marriages recognised and made legal in India.

In light of the foregoing, it should come as no surprise that the law recognises man as a person on the basis of his free will, but morality recognises only one will– the will to do what is right. To put it simply, morality does not necessitate any external activity on the part of the individual, while the law is that part of one's behaviour that has nothing to do with one's intention or any other form of internal faith. Law is affirmed by the state, and morality by the society.

Law and Morality: Historical Background

Despite the fact that the Hart Fuller[2] issue has been discussed in the legal literature, the modern social institutions are where law and morality really shine. It was always believed that law and morality stem from the same place– local custom–and that the two should be treated as interchangeable in any given culture; however, modern observation suggests that the two have begun to evolve in very different directions. The idea that morality should be imposed by law because doing so will result in a peaceful, harmonious community is typically viewed with scepticism.

Powerful people influenced the nature of moral standards of common people through variety of ways, India's Vedic and Epic periods, sages and saints had the power to define moral standards for the public, and the king or queen was obligated to uphold justice whenever a dispute arose over the application of those standards to a particular case of behaviour. The Smiriti of Manu, *"the first lawmaker on Earth, the Mahabharata, and the Arthshashtra of Kautilya"* all agree that the monarchial regime was formed to safeguard public morality or the Dharma so that the strong may not crush the weak by their passions. In modern society, the old Indian concept of dharma has less and less sway as a guiding principle.[3]

The Concept of Law and Morality:

It's possible to make a connection between morality, society, and the law. While the law is consistent and applies uniformly to everyone, morality can vary greatly from person to person. Laws have been shaped by moral principles, but morality has been part of human culture long before it had any legal ramifications.[4]

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2 Hart Fuller, *Positivism and the Separation of Law and Morals*, 1958.
3 Justice D.P. Singh, *Morality in Law*, Eastern Book Company, Lucknow, 2012.
4 Supra Note 1.

William Pitt[5] asserts through his observation that *"Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves".*[6]

Law has been accurately defined by Oxford dictionary as – *"the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects."*[7] The expression "law" as such complex and open to interpretation, yet complexity demands nuance, and nuanced definitions are the threads of comprehension that guide us through the maze of human affairs. The traditional definition encompasses all aspects of law as a concept: *"Law is an ordination of reason for the common good by him who has care of the community and promulgated."*[8]

A society is a unified order based on its final aim and goal, and different societies can be categorised in accordance with their respective final goals. Therefore, societies are required by people's inherent worth and requirements for survival. The mutual good, or the achievement of a community's ultimate goal, which is the purpose for its existence. This makes laws an essential component of any society. The goal of most civilizations is to ensure that every person has a chance to realise his or her full potential.

Savigny and Ehrlich *"emphasised on the actual observance by the society and & the growth of customs as the conclusive elements of law. Ehrlich According to them, the law may receive authority from the sovereign but it is not created by him."*[9]

The Constitution of India is the supreme Law of the land, and no one can dispute that. This document is both organic and noble in its construction. The Indian Judiciary looks to it as a live document that helps them decide cases. The many branches of government have a moral compass in the values of liberty, equality, fraternity, and justice. Keeping the balance of justice in society requires the judiciary to occasionally come up with novel solutions, or doctrines.

Social Sanctions Bentham emphasized that *"Strictly speaking morality guides principles of ideal behaviour in consonance with what is right and good. Moral appeal to our conscience marks our ability to decide between right and wrong, Morality in its true nature is an internal force and appeals to the human conscience and its sanctions are mainly internal. According to Bentham there are external sanctions also, i e. the social sanctions. The social sanctions are not sanctions of highest morality but are sanctions of positive morality or popular morality as it may be called. The rules of highest moral law, like the rules of divine law are constant and internal and are not changeable with the change of time and*

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5 The Speeches of William Pitt, *"William Pitt the Younger was British Politician during the late eighteenth and early nineteenth centuries. He has served as Prime Minister of Great Britain from 1783 to 1801",* the House of Commons, Volume I, London, 1817, pp. 31-32.

6 Susan Ratcliffe, *Oxford Essential Quotations*, 6th Edn., Oxford University Press, 2018.

7 *Oxford English Dictionary,* Volume 1-20, Oxford University Press, USA, Oxford (1989).

8 Saee Vaishampayan, *"Law and Morality",* ILE Legal Blog, on 7th July, 2022, available at: https://iledu.in/law-and-morality/

9 Justice Gumanmal Lodha, *Law Morality and Politics*, Unique Traders, Jaipur, 1981 at p.5.

place. On the other hand positive morality varies according to time and place. Positive morality is what a community at a particular time and place has thought it convenient, expedient or reasonable to enforce as binding on the conscience of the people."[10]

There is no clear definition of "Constitutional morality" in the document. This has led to a variety of interpretations from the Judges. Thus, "the major elements of the constitutional morality in the context of the Constitution of India are- Preamble, Rule of Law, Right to Equality, Unity and Integrity of Nation, Social Justice, Individual liberty and Freedom of Expression". [11]

Morality based on the Constitution requires a government that serves the interests of its citizens in a free and fair manner. Democracy, socialism, equality, honesty, and integrity are all essential tenets of India's founding document. In a nutshell, it is the preamble that explains the values upheld by the Constitution. Constitutional morality entails adhering to constitutional standards and refraining from behaviour that undermines the rule of law or reflects arbitrary decision-making. In fact, it pivots on the fulcrum like a laser beam and directs infrastructure development. Constitutional morality includes a dedication to the document itself.[12] Furthermore, when people act in accordance with constitutional morality, everyone in the state benefits as a result of constitutionalist concepts percolating through the system.[13]

Therefore, Constitutional Morality, which can be found in the Preamble, is the heart and soul of the Constitution. The Preamble to India's Constitution lays out the document's guiding principles. Part III of the Constitution of India, titled Fundamental Rights, contains the document's stated goals and ideals in articles 12 through 35, as well as in the preamble. The constitutional morality of a democratic state mandates the protection of basic human rights vital to everyone's right to a dignified and independent life.

Modern Perspective of Morality:

Thus, in the contemporary world, morality sneaks into the law under the appearance of fairness and morality. The legislative branch's power is constrained by moral considerations. Law alone cannot regulate and control all human actions and interactions. Many interactions between people are not regulated by the law because morals are trusted to do so. The law is made flawless by ethics. Paton cites a marriage as an illustration. A couple's marital relationship doesn't need to be regulated by the law as long as love is present. However, the doorbell rings when love finally stops.

Any new legislation must be thoroughly grounded in the preexisting legal framework. To pass laws that will ensure justice, a progressive perspective is required, which isn't always compatible with morals. But positivism's ideology had progressed over the years, and morality had become an exception to the rule. Some examples of this can be seen in recent decisions made by the Indian

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10 Ibid, at p. 6.

11 Surbhi Jindal, *"Social Morality vs. Constitutional Morality with special reference to Navtej Singh Johar v. Union of India, Dec., 21, 2021",* available at: "https://articles.manupatra.com/article-details/Social-Morality-vs-Constitutional-Morality-with-special-reference-to-Navtej-Singh-Johar-V-Union-of-India"

12 *Manoj Narula* v. *Union of India* (2014) 9 SSC 1.

13 *Navtej Singh Johar & Ors.* v. *Union of India*, (2018) 10 SCC 1.

Supreme Court, such as those dealing with the legality of abortion, the rights of LGBTQ, and live-in relationships.

Concept of Same Sex Marriage: A Critical Analysis

Arranged marriage has always been a part of Indian society. Some people are still struggling to adjust to the radical shift from arranged to love marriage, much less the equally radical shift to same-sex unions. When homosexuality was first decriminalised, the judicial ruling was met with widespread opposition and harsh criticism from the LGBTQ+ community. Sukhdev Singh, activist and publisher of the LGBTQ publication Gaylaxy, puts it this way: "There are a host of other battles to be fought and won." [14] The common misconception is that Gay partnerships are a product of our modern, highly individualistic, mechanically utilitarian civilization. In contrast, homosexual partnerships are not a recent phenomenon. Throughout ancient, mediaeval, and modern India, evidence of it have been uncovered. It is extensively thought that the legalization of gay marriage will result into increased homosexuality, but this is not the case; rather, sexual orientation is determined by a person's genes; all that decriminalisation can do is encourage people to embrace their identities openly.

Same-Sex Marriage under Personal Laws:

Marriage and other forms of social commitment are given great importance in Indian society. A sacrament is an act with a focus on the divine roles. It explains how to handle a variety of issues that can arise in lesbian marriages, including how to conduct religious ceremonies and how to handle the exchange of shrines at feasts.

In 1988, for instance, two female police officers were married during a Hindu ceremony. Their marriage was not legally recognised, and both of their jobs were terminated as a result, yet their loved ones and cultural traditions accepted them as husband and wife. It is intriguing that many inhabited and non-English-speaking persons not affiliated with the LGBT movement have announced their homosexual partnerships.

To get a same-sex marriage recognised under Hindu personal law, one can take one of two approaches. The first is to use the law as it currently stands to make same-sex unions valid. Second, identifying the LGBT community as a distinct subculture whose norms encourage relationships between people of the same gender. The third goal was to examine the Hindu Marriage Act of 1955 on the grounds that being unconstitutional and make same-sex marriages legal. Amendments to the Act to legalize same-sex weddings, number four.

It might be argued that the regulation solemnizes same-sex couples unless one of them is a wife and the other is a man, as the regulation is gender-neutral and the expression wedding doesn't apply. That's what several lesbian couples attempted. Both the bride and the bride are the names of one of the wives. Because it limits the statute's applicability and runs counter to the

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14 Ananya Khanna, *"Same-Sex Marriage in India"*, on January 12, 2015, available at: "https://www.lawctopus.com/academike/same-sex-marriages-in-india"

common understanding of the terms "engagement," "mother," and "engagement," this argument cannot be supported by substantive legislation.

It seems that the term also standardizes marriages between the same sexes. Assumptions that races are inherently different, family roles are set in stone, and that only partners of the same sex should embrace old-fashioned roles in order to sustain a romantic companionship and become more same married are all upheld by this view. [15]

The role of Same-Sex Marriage under the Special Marriages Act:

Attempting to amend the Special Marriage Act of 1954 to legalize same-sex marriage is another strategy to avoid stirring up moral hackles. The SMA is a lay law that removes barriers to marriage for persons of different faiths or who do not wish to have their own laws constrained. In place of a traditional religious rite, the engagement is officially recorded by the marriage officer. The SMA's current age requirements of 21 for males and 18 for women suggest that it is intended solely for heterosexual couples. To legalize same-sex marriage, the SMA clause would be the same as those enacted in other nations. 25 countries as of 2015 have passed these regulations, beginning with the Netherlands in 2000 and including Britain and the USA.

Arguments by people against Same-Sex Marriage:

This isn't a debate about democracy; it's about religion. Many people, including those in India, feel strongly against the practise because of its rude, vulgar, and immoral nature.

1) They are not accepted as normal by some people because they can't make copies of newborns. There are no references to Adam and Steve in Origin, thus this must be a religious belief that God created Adam and Eve since homosexual marriage is not legal.
2) Marriage and the collaboration of sexes are important to this society. Civilization's framework was built to last. This goes against the established laws of the land, which have been based on the Ten Commandments for thousands of years. [16]

To deny marriage to those among us who need it is to limit their rights, to treat them unjustly, to physically and morally disadvantage them, and to risk serious personal harm, all of which go to the heart of the subject of equal equality. Because restricting people's ability to wed is a punishing action, societies should only enact such prohibitions when they are persuaded that doing so is necessary to protect individuals and communities from harm. This is why the most brilliant minds in law have debated the topic, such as when the US Supreme Court judges explained to homosexual marriage advocates why no reasonable argument could be given about the harm it could cause to society as a whole.

However, the merger of the same sexes has no effect on anyone. No one's union is harmed by anyone other, and nobody else's denial of another person's

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15 Ishank Bangarwa, *"Analysis : Same-Sex Marriage in India"*, available at: "https://www.legalserviceindia.com/legal/article-8025-analysis-same-sex-marriage-in-india.html"

16 Ibid.

right to marry undermines the legitimacy of anybody else's right to marry. The idea that marriage between two heterosexuals might cause harm is absurd. No adverse effects of same-sex marriage laws have been substantiated.

Judicial Trends of Same Sex Marriages:

The judiciary has played a vital role in providing LGBTQ community with their rights regarding same sex marriages. Over the time, judges have interpreted the concept of same sex marriages in various and elaborative ways. These interpretations done by Hon'ble Judges are in context with justice and fair play. Some of the cases are stated below:

The Hon'ble Highest Court in the case of S. Khushboo v. Kanniammal[17], ruled that the positivist argument behind this was that prohibiting same-sex or live-in marriages would not lead to the abolition of the civil liberties enjoyed by all citizens. All humans should be treated equally under the law, even though doing so goes against the grain of social morality. If you do it because you feel you have to, you'll be violating Articles 14 and 21 of the Constitution, which state that all people are created equal and need to be treated with dignity and respect, respectively.

We cannot, however, assert that Indian courts always follow positivism or that they disregard societal morals like those described above. For the sake of society's health and safety, even the court has mentioned the need to rein in positivism. The courts have been very clear that we cannot just disregarded morals in favour of following the letter of the law. There needs to be a balance between the two, and occasionally the positivist approach should even sway in favour of the people. In Deena v. Union of India[18], the SC underlined that In order to maintain its social significance, the law must be adaptable to new circumstances and willing to amend its principles as society evolves. These realizations are a vital reminder that the law, like our Constitution, is a living, evolving text that develops over time. This is why courts need to be guided by both constitutional and fair morals. This case highlights the idea that the law should evolve to meet the needs of the modern world.

A number of judges, including those on the Hon'ble Supreme Court, have used the term "Constitutional Morality" in their rulings since 2014. Constitutional morality has brought about a social revolution in India in a number of Supreme Court rulings.

In the Suresh Kumar Koushal v. Naz Foundation[19], the hon'ble court ruled that Article 377 of the Indian Penal Code is constitutional. A very small percentage of the country's population identifies as lesbian, gay, bisexual, or transgender, it said. That social morality was prioritized over constitutional morality is made clear by this statement. Even if the LGBTQ+ community is relatively small, that does not mean that its members do not have full access to all of our society's protections. Specifically, Articles 14, 19, and 21 have been broken.

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17 AIR 2010 SC 319.
18 (1983) 4 SCC 645
19 (2014) 1 SCC 1.

In Manoj Narula v. Union of India[20], Justice Dipak Misra remarked through referring to Ambedkar's speech on Constitutional Morality, *"Constitutional Morality means to bow down to the norms of the Constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner."* It's part of what makes being committed to the Constitution so important. [21]

The Navtej Singh Johar v. Union of India[22] is one of the landmark judgments of the Hon'ble SC, in which a panel of five judges used a novel and groundbreaking way to interpreting Section 377. The Court's decision was based on the three most important elements of constitutional law: life changing constitutionalism, constitutional morality, and the right to privacy. The antiquated Section 377 was defeated by these three guiding concepts. During his review of the *Navtej Singh Johar case*, then-Chief Justice of India Dipak Misra observed that constitutional morality is not limited to the Constitution's written words. It's not only about following some basic constitutional rules. It instead opens the door to a more accepting and diverse society.

The Indian Constitution was written to protect the basic liberties that are essential to the flourishing of Indian society. The concept of Constitutional morality was envisioned at the time of the adoption of our Indian Constitution in the hopes that all 3 branches of government-the Judiciary, the Legislative, and the Executive- would uphold it. Any effort to standardise society along ideological lines would be in direct opposition to the values upheld by the Constitution. Therefore, it is the responsibility of state institutions to prevent policy decisions from being swayed by majoritarian ideas in a way that violates the rights of a minority.

In *Government of NCT of Delhi v. Union of India*[23], it was precisely observed by the Hon'ble court that "*Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse.*" The Courts are under an obligation to preserve the Constitution's guiding principles and make decisions based on the letter of the law rather than the preferences of the majority. It is the responsibility of the judicial system to be independent of the dominant social ideology. The Indian Penal Code, specifically Section 377, is a direct challenge to the widespread acceptance of norms and beliefs that are not supported by the law. The spirit of Constitutional morality should not be crushed by anything that is not legally valid.

Thus, the constitutional morality can direct the courts to make decisions that are just and fair for all segments of society, regardless of how small that segment may be. Every Indian person has a right to basic freedoms, and it is the responsibility of the government to protect those rights.

Concluding Observations:

Despite their differences, I believe that law and morality have mutual effects and hence cannot be totally separated. Despite the fact that morality can

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20 (2014) 9 SCC 1.
21 Ibid.
22 2018 INSC 790.
23 2023 LiveLaw (SC) 423.

be a public voice of morality and does occasionally seek validation through societal approval in the present day modern environment, when brains have developed and newfangled mindsets are turning tables, morality cannot be disregarded. Although it would be incorrect to suggest that law and morality are at odds with one another, they do eventually come into conflict since the law evolves to meet new challenges and standards. Both concepts will perpetually stand opposite one another.

Thus, the relationship between law and morality in modern India with respect to same-sex marriages is a dynamic and evolving one. Legal progress and changing societal attitudes reflect a growing recognition of LGBTQ rights and personal autonomy. However, deeply held cultural and religious values continue to play a role in shaping the discourse. The ongoing debate highlights the need for a nuanced understanding of the interplay between law and morality and the importance of ensuring equal rights and protections for all citizens, regardless of their sexual orientation.

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HOMOSEXUAL MARRIAGES IN INDIA- A JUDICIAL PERSPECTIVE

Ananya Bose*

Abstract: Before Navtej Singh Johar's judgment, homosexuality was a criminal offense under *Sec.377* of the Indian Penal Code after this judgment freedom of choice to the citizens. Even then, LGBTQ+ people don't have the right to choose their life partner for "Marriage". Many people argue that it is not essential for two people in a love relationship to marry. Researcher supports this argument but what if someone wants to make their relationship official? Having said that marriage comes with significant marital rights like inheritance, adoption, etc. If a relationship does not get legal recognition, it is impossible to enjoy these rights. It is a negligent and stereotypic behaviour of the legislature not to make homosexual marriages legal. In this research paper, the researcher describes why homosexual marriages should be legal, the socio-religious and historical aspects of homosexuality, how the legislature incorporated it into the Indian legal system, and the comparative study of how homosexual marriage and its legalization is seen across the globe.

Keyword*:* Homosexuality, LGBTQ+, Marriage laws, Inheritance, Surrogacy, Adoption.

Introduction:

The existence of homosexuality is not a new concept in Indian history. From ancient times in India, we see examples mentioned in various ancient scripts about homosexuality. India's religious and cultural heritage has a long history of multiple gender and sexual expressions more than any Western country. Khajuraho temple which was built between 950 AD and 1050 AD has sculptures showing homosexual expressions e.g., men displaying their genitals to each other, women erotically embracing each other, etc. Sun temple of Orissa of the 13th century has similar images. The temple's exterior is covered in sculptures depicting erotic scenes from the Kamasutra. The 9th chapter of Kamasutra of Vatsyayana which was written in the 4th century BC talks about the homosexual expression and sexual activities between transgender. The cave of Ajanta and Ellora which tells about the life of Gautam Buddha has paintings and sculptures of high architectural value. These paintings and sculptures, show the sexual activity of homosexual couples. Valmiki's Ramayana captures a scene; described by Lord Hanuman, rakshasa women were kissing each other. In Krittivasa Ramayana there is a story of the birth of King Bhagirath. King Dilip had two wives when he died without leaving an heir. One day lord Shiva came to the dream of the widows and asked them to make love with each other to become pregnant. After which one of them got pregnant and gave birth to the famous King Bhagirath. Not only Hinduism or Buddhism but also the second largest religion of India, Islam shreds evidence of homosexual expression. In the highest Islamic religious book 'The Quran', some scholars found gender fluidity which states "Allah shapes you in the wombs as he pleases". In his work, the Sufi saint Sah Hussain confesses his love for a Hindu boy called Madholal and they were buried together in Lahore.

Evolutionary biologists have investigated the genetics of homosexuality, a phenomenon seemingly contradictory from an evolutionary standpoint. A study led by evolutionary geneticist Brendan Zietsch and colleagues examined data from the UK Biobank, the US National Longitudinal Study of Adolescent to Adult Health, and 23andMe, involving 477,522 people with same-sex experiences and 358,426 exclusively heterosexual individuals. The researchers identified genetic patterns associated with same-sex behaviour, indicating a small effect on

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heritability (8-25%). Simulating human evolution, they found these patterns would disappear unless they provided an evolutionary advantage, such as increasing the number of sexual partners for reproduction.

The study suggested an overlap between genes associated with same-sex behaviour and those linked to having multiple sexual partners, risk-taking behaviour, and openness to new experiences. However, critics argue that the study's limitations, including a biased dataset and potential cultural influences on sexual behaviour, make it challenging to draw definitive conclusions about the genetic basis of sexual orientation. Some scientists believe the research primarily identifies genetic markers related to traits like openness to new experiences rather than providing conclusive evidence about sexual orientation genetics.

All the fluidity and facilities of ancient India changed in the British period. First-time homosexuality became criminalized in 1861 by the British government under *Sec.377* of the IPC. The Britishers' move was to impose Western or mainly Christian beliefs and culture in India. *Sec.377* of IPC states "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life*[1]*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*"[2] After Independence, there was a long battle to make *Sec.377* unconstitutional and give rights to LGBTQ+ people. In 2009 in the landmark case of *Naz Foundation Govt. v. NCT of Delhi*[3], the High Court of Delhi held that *Sec.377* of the IPC imposed an unreasonable restriction on two adults engaging in consensual intercourse in private. Thus, it directly violated their basic fundamental rights enshrined under *Art.14,15,19, and 21* of the Indian Constitution. When the LGBTQ+ community finally thought they got their right after 8 years 8-year-long battle, the Supreme Court of India overturned its judgment and re-criminalized homosexuality in the landmark case of *Suresh Kumar Kaushal v. Naz Foundation*[4] on 11th December 2013. In its landmark judgment in the case of the *National Legal Services Authority v. Union of India*[5], the Supreme Court created the 'third gender' status for hijras or transgenders. Finally, the Supreme Court on 6th September 2018 in its landmark judgment *Navtej Singh Johar v. Union of India*[6] *Sec.377* again repealed. The Court said it is an infringement of fundamental rights under *Art.14,15,19,21* of the Indian Constitution. It is an infringement of a person's freedom of expression of sexual identity. Sexual orientation is a part of self-identity and if this is violated then it is also a violation of the right to life and personal liberty under *Art.21* of the Indian constitution. The court directed the government to spread awareness for LGBTQ+ people and ensure they are not discriminated against (*Art.14* of the Indian Constitution). This Judgement also discusses mental health issues, the right to live with dignity, the right to privacy, and the right to determine the sexual identity of LGBTQ+ people. The researcher discusses the statutory provisions regarding homosexual marriage law in India and its impact, Comparative studies with other countries around the world, Critical analysis of

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[1] Subs. by Act 26 of 1955, sec. 117 and Sch., for "transportation for life" (w.e.f. 1-1-1956). (access on 27.02.23)
[2] Indian Penal Code,1860
[3] Naz Foundation Govt. v. NCT of Delhi, MANU/DE/0869/2009 (access on 12.06.23)
[4] Suresh Kumar Kaushal v. Naz Foundation, AIR 2014 SC 563
[5] National Legal Services Authority v. Union of India,(2014) 5 SCC 438
[6] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791

these laws, and suggestions on how to incorporate the law into the Indian legal system.

Judicial Decision & Its Impacts:

The right to marriage is neither a fundamental nor a constitutional right in India, unlike Art.16 of the Universal Declaration of Human Rights. The right to marriage in India evolved from various statutory enactments and the different judicial decisions of the Supreme Court of India which is binding to all courts under *Art.141*[7] of the Indian Constitution.

In 2014 the Supreme Court took a Suo moto case *In Re: Indian Woman Says Gang-raped on orders of Village Court*[8] which recognized the freedom in the choice of marriage under *Art.21* of the Constitution of India. In *paragraph 14* of this ruling, it is asserted that the state is obligated to safeguard the fundamental rights of its citizens. *Art. 21* of the constitution, which encompasses the freedom to choose in marriage, is a vital component of these fundamental rights. If the state, as defined in *Art. 12*, breaches this right, it constitutes an offense and reflects the state's inability to fulfil its duty to protect the fundamental rights of its citizens.

This concept further evolved in the landmark judgment of Supreme Court *Justice K.S.Puttaswamy(Retd) v. Union of India*[9]. The development of the right to privacy under Article 21 of the Indian Constitution originated from this case. In paragraph 81, the majority judgment by Justice D.Y. Chandrachud stated that fundamental rights encompass the right to privacy, including personal privacy, information privacy, and the privacy of choice. In the conclusion of this judgment, the court held "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy…."

This judgment was further strongly established by another two judgments passed just after this. In the landmark case of *Shakti Vahini v. Union of India*[10]**.** The 42nd para of this judgment stated that when two consenting adults choose each other as life partners, it is a manifestation of their constitutional rights under *Art. 19 and 21*. This right is protected by constitutional law and should not be compromised by notions of class honor or group thinking lacking legitimacy.

> "42. … It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under *Art.19 and 21* of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to

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[7] "Law declared by Supreme Court to be binding on all courts the law declared by the Supreme Court shall be binding on all courts within the territory of India"

[8] In Re: Indian Woman Says Gang-raped on Orders of Village Court published in Business & Financial News dated 23.01.2014

[9] Justice K.S.Puttaswamy(Retd) v. Union of India, (2017) 10 SCC 1

[10] (1994) 3 SCC 569

> the conception of class honor or group thinking which is conceived of on some notion that remotely does not have any legitimacy."[11]

Another case is *Shafin Jahan v. Ashokan K.M* J. Chandrachud stated in *para 21* that the right to marry a person of one's choice is fundamental under *Art. 21* of the Constitution, guaranteeing the right to life. This right can only be restricted by fair and just laws. Constitutional liberty allows individuals to make decisions crucial to their pursuit of happiness, encompassing matters of belief, faith, dress, food, ideas, and love. The Constitution protects the freedom to follow one's chosen way of life or faith. While the law may regulate valid marriages, decisions on acceptance or continuation of a marital relationship are the prerogative of the involved parties, with society having no role in determining their choice of partners.

> "21….The right to marry a person of one's choice is integral to *Art.21* of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law that is substantively and procedurally fair, just, and reasonable. Intrinsic to the liberty that the Constitution guarantees as a fundamental right is the ability of each individual to make decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and food, ideas and ideologies, love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners."[12]

All these Judgements make it very clear that the Right to Marriage comes under the Right to Privacy which comes under *Art.21* of the Indian Constitution. This Right gives opportunity to the individual to choose their life partner according to their choice. In all of this Judgement nowhere it was mentioned that the choice should be from among the opposite gender. In my opinion, according to these Judgements homosexual couples also have the same rights or it will be against the *Art.14,15,19,21* of the Indian constitution. Homosexual people also should get the same protection as others which talks about the right to marry a person of their choice, and the state can't interfere in these matters. If these rights are infringed then it will be the infringement of fundamental rights and the person can knock on the door of the supreme court for this under *Art.32* of the Indian Constitution. These concepts become clearer in the landmark judgment of *Navtej Singh Johar v. Union of India*[13] which makes *Sec.377* of IPC unconstitutional**.** J. DY. Chandrachud states in *para 156* that the LGBTQ+ community have the right to enjoy all the constitutional right as well as liberties like any other citizen of our country. They are entitled to "equal protection of the

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[11] Shakti Vahini v. Union of India, (2018) 7 SCC 192, P-15

[12] Criminal Appeal No. 366 of 2018 (Arising out of S.L.P. (Crl.) No. 5777 of 2017), P-20 Shafin Jahan v. Asokan K.M. and others, (09.04.2018 - SC) : MANU/SC/0340/2018

[13] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321: MANU/SC/0947/2018

law" and "equality before the law". J. Rohiton Nariman states that the sexuality of the LGBTQ+ community is not an abnormal variant of human sexuality and they should have the right to cohabit together and the right to marriage. [14]

After four years of decriminalization of homosexuality, are transferred to the Supreme Court of India clubbed all the petitions seeking recognition of same-sex marriage from different High courts on the 6th of January, 2023. *Supriya Chakraborty & Abhay Dang v. Union of India (2023)*[15]**,** the court determined that, according to existing legal frameworks, marriage, considered a legally governed institution, does not presently encompass same-sex couples. The court did not find the absence of such inclusion to be unconstitutional. Specifically, the Special Marriage Act of 1954, formulated for inter-faith unions and pivotal in this case, remains unmodified in restricting marriages to a 'man' and a 'woman.' In essence, the court concluded that there is no inherent fundamental right to marry, though a minority viewpoint highlighted the interconnectedness of the right to marry with other fundamental rights such as freedom of expression, freedom of movement, and the pursuit of a life marked by dignity and autonomy. Also, a review petition was filed in the Supreme Court to challenge its decision to deny marriage equality rights to LGBTQ+ couples.

Comparative Analysis:

In countries around the world the status of homosexuality is not the same. As of now (27th Feb 2023), 55 countries and territories have legalized same-sex marriages. The countries and territories which make same-sex marriage legal are *Andorra* (civil partnerships available since 2005 but same-sex under the name "stable union of the couple" marriage become legalized in 2023 though the law still not came into force), *Argentina* (from 1st Aug 2015 under the statute named as Código Civil y Commercial), *Aruba* (from 1st September 2021 under geregistreerd partnerschap), *Australia* (9th Dec 2017 under the Marriage Amendment (Definition and Religious Freedoms) Act 2017), *Belgium* (since 1st June 2003 under article 143 of the Belgian Civil Code (Book I, Title V, Chapter I)), *Brazil* (since 16th May 2013 under Conselho Nacional de Justiça (CNJ) resolution), *Canada* (20th July 2005 under the civil marriage act), Denmark(15th June 2012 under Danish Registered Partnership Act), *Finland*(1st march 2017 after gender neutral amendment in Finish Marriage Act) , *France*(since 18th may 2013 under French: Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe), *Greenland* (under statute Nalunaarsukkamik inooqatigiinneq), *Iceland* (27th June 2010 the statue Icelandic: Lög um staðfesta samvist replaced by gender neutral marriage law), Netherlands(2001 under civil marriage), *New Zealand* (since 2013 under The Marriage (Definition of Marriage) Amendment), *Switzerland* (since 1st July 2022 Federal Act on registered partnerships of same-sex couples become same sex marriage), *Taiwan* (since 7th May 2009 under the Enforcement Act of Judicial Yuan Interpretation No. 748), *United Kingdom* (since march 2014 under Marriage(same sex couple) Act,2013), *United States of America* (Supreme court legalised same sex marriage on 26th June,2015 in the case of *Obergefell v. Hodges*)etc[16]. By contrast, not counting non-state actors and extrajudicial

[14]https://www.barandbench.com/columns/litigation-columns/four-years-since-the-supreme-courts-navtej-johar-verdict-matrimonial-rights-still-remain-in-the-closet (access on 02.03.23)

[15] W.P no. 1011 of 2022 on 17th October 2023 (SC)

[16] https://www.equaldex.com/issue/marriage (access on 15.03.23)

killings, only one country is believed to have imposed the death penalty on consensual same-sex sexual acts: *Iran*.

European Countries were the pioneer of legalized same-sex marriages and their rights. The three countries which make same-sex marriage legal are the *Netherlands*(2001), *Belgium*(2003), and *Spain*(2005). France makes same-sex marriage legal under the Taubira law under François Hollande(2013). The Netherlands was also the first country around the world to make the adoption rights of LGBTQ+ people legal in 2000[17].

American continents also have a significant role in the rights of LGBTQ+. Quebec was the first country in the world in 1977 where they banned discrimination based on sexual orientation was banned under the Quebec Charter of Human Rights and Freedoms. The US recognized same-sex marriage in 2015 by judgments, statutes, and direct people voting. In Latin America homo-parental adoption and same-sex marriage are allowed in Argentina (2010), Brazil (2010 and 2012 respectively), Uruguay (2009 and 2013), and Colombia (2015 and 2016).

The most repressive parts of the world concerning gay rights are Africa, the Middle East, and South Asia. South Africa is an exception on the African continent with the legalization of adoption in 2002 and marriage in 2006. In 2006, it became the fifth country in the world to have authorized same-sex marriage, which was made possible thanks to the fight against apartheid, which has greatly advanced the rights of racial minorities but also those of gender and sexual orientation. However, despite this permissive legislation, there is still a lot of homophobic violence in South Africa, including gang and corrective rapes of lesbians.

In the Asian continent, we can cite Cambodia, which had its first Pride march in 2003. In China, sodomy was decriminalized in 1997, and homosexuality was removed from the list of mental illnesses in 2001. However, there is no law protecting against discrimination, nor the possibility of marriage or adoption for couples of the same sex. Worse, conversion therapies are promoted by the government, and homosexuality remains highly stigmatized in Chinese society.

The Republic of South Korea does not officially recognize the rights of LGBTQIA+ people in its territory, and homosexuality is criminalized in the South Korean military by the military penal code. Recently, on 23rd Feb 2023 in a landmark ruling, a South Korean court ruled that same-sex are entitled to the same spousal coverage as heterosexual couples under the national health insurance service, marking the first legal recognition of same-sex unions in South Korea.[18]

In Japan, the government is increasingly pressured to legalize same-sex marriage. “Registered partnerships” have been set up at the local or departmental level in nine towns. Likewise, there are legal protections as well as anti-discrimination laws to protect LGBTQIA+ people in some cities, from local governments (ban on discrimination in hiring in Tokyo, for example) but no national law on this subject.

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[17] https://www.equaldex.com/issue/adoption (access on 15.03.23)

[18]https://www.outlookindia.com/international/south-korea-court-recognises-same-sex-couple-rights-in-a-landmark-ruling-news-264722 (access on 15.03.23)

Taiwan is the only country in the entire Asian Continent that made same-sex marriage legal in 2019 but there is an exception for the citizen of Mainland China they have to register their marriage in China before they apply in Taiwan[19]. However, they are not allowed to take joint adoption when the child is not genetically related to them.

The most recent country which makes same-sex marriage legal is Andorra on 17th Feb 2023[20]. On the contrary, Suriname made same-sex marriage unrecognized on 1st Feb 2023[21].

Some International institutions are significant for the recognition of same-sex marriage rights like The Inter-American Court of Human Rights which gave guidance to 20 signatory countries for advocating marriage equality in their countries. [22] Also, there is the European Court of Justice (ECJ) which considers on recognition of equal marriage rights to the EU and non-EU homosexual couples in all European countries. [23]

Critical Approach:

In the historical aspect of homosexuality, researcher already discussed the religious aspect of homosexuality. Though there is so much proof of homosexual history in every religion most religions don't support homosexuality. Hinduism and Buddhism are the only religion that takes a liberal aspect on this matter. Buddhists say that till the time any sexual activity is consensual and is out of affection it is permissible. Dalai Lama also has a similar stance that homosexual sex is allowed provided nobody is harmed and it's completely consensual. Several Hindu texts have portrayed the homosexual experience as natural and joyful.

The researcher discusses the religious perspective because marriage laws are maximally covered under personal law based on religion in India. The above clearly shows that Hinduism (to an extent) and Buddhism recognize same-sex relationships. Hence any amendment in personal law for same-sex marriage is not a good decision.

In this situation, the only stand the government takes is an amendment to the Special Marriage Act and the addition of a provision for same-sex marriage.

Family laws in India are categorized under two heads i.e., personal and secular laws:

- Secular laws are applied to all citizens regardless of their faith, caste, etc. i.e. The Special Marriage Act.
- Personal laws differ from religion to religion. There are four personal laws governing marriages in India i.e., the Hindu Marriage Act, Sharia law, Christian Marriage Act, and Parsi Marriage and Divorce Act, of 1936.

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[19] https://www.taipeitimes.com/News/front/archives/2023/01/21/2003792946 (access on 15.03.23)
[20] https://www.equaldex.com/region/andorra (access on 15.03.23)
[21] https://www.equaldex.com/region/suriname (access on 15.03.23)
[22] https://www.hrc.org/resources/marriage-equality-around-the-world (access on 15.03.23)
[23] https://www.hrc.org/resources/marriage-equality-around-the-world (access on 15.03.23)

Hindu Marriage Act, 1955 provides in *Sec.5* that the age of the *bridegroom* must be 21 years and the *bride* must be 18 years old at the time of the marriage. The terms are a heteronormative notion and put the right to choice of partner in the LGBTQ+ community at vulnerability.[24]

There are 3 ways to make the marriage law inclusive of the LGBTQ+ community.

- Modifying or amending the existing laws or making the language of the act gender-neutral.
- Giving the status of Civil partnership[25] rather than marriage rights.
- Drafting a whole new Act by considering the LGBT+ as a separate community.

A. Modifying or amending the existing laws or making the language of the act gender-neutral

There can be several problems that may arise in adopting this method which are discussed as follows:

i) Definition and terms:

- **Husband and Wife:** These terms are generally used for heterosexual couples where the groom is known as husband and the bride as wife but for a homosexual couple these terms should be redefined as both are from the same gender. This is not about only general terms because *Sec.27(1A)* of the Special Marriage Act,1954 provides grounds where the wife can apply for divorce. If this term does not change under *Sec. 3* of the act will cause ambiguity for LGBTQ+ people and law enforcement authorities.
- **Sodomy:** sodomy is a ground for divorce. But after striking down *Sec.377*, these terms need to be redefined.
- **Prohibited degree:** The degree of these relationships varies between men and women. But since LGBTQ+ marriages don't happen between a male and a female, these terms will need to be redefined.
- **Conjugal bond:** Consumption is a very important factor for a valid marriage and in the case of impotency a marriage is voidable. But in the case of a same-sex relationship, this rule is not valid. So, this definition of valid marriage also should be changed.
- **Grounds for Divorce:** The interpretation of grounds like adultery, desertion, and cruelty varies in the case of men and women. Thus, this power imbalance has to be clearly defined in the case of same-sex marriages.

ii) The implication of self-gender identification:

After the landmark judgment of the Supreme Court *National Legal Services Authority v. Union of India***,** a person can decide their gender or choose their gender according to their choice. Transgender can define themselves as either man, woman, or third gender. Not at the time of the birth but also in some situations, they can change their identity. Hence when the new law is framed or

[24] Hindu Marriage Act,1955
[25] https://pearcelegal.co.uk/blog/what-are-civil-partnerships (access on 18.03.23)

redefined authorities should keep this in mind so that their legal right does not get violated.

B. Giving the status of the Civil Partnership

India is not a very progressive country and here the majority of people are orthodox in their religious and cultural thoughts. In India, marriage is a sign of sanctity. So, civil partnership or civil union can be an option to give some legal rights same as a married couple though it is not as strong as the marriage right. This union gives the right to the partners to open joint accounts, tax returns, pension, insurance, and other such rights but is more flexible than marriage. "A Civil Partnership is a legal union that can be entered into by two people who aren't related, the partnership has the same responsibilities as in marriage but the difference is that a civil partnership is entered into by signing a civil partnership document while marriage is entered by vows"[26]. Civil partnership is allowed in the UK under the Civil Partnership Act, 2004. After that in 2020, they gave marriage rights to same-sex couples. They can choose either to go for civil partnership or marriage. Recently 14 regions[27] have given this right to homosexual couples.

In the case of *Supriya Chakraborty & Abhay Dang v. Union of India*[28] Chief Justice Chandrachud and Justice Kaul, supported the idea of civil unions for non-heterosexual couples, representing a notable stride towards achieving marriage equality. CJI said that the right to form a union encompasses the freedom to select a life partner, and the acknowledgment of this choice is crucial. Failing to recognize such associations is considered discriminatory. Every individual, regardless of their sexual orientation, possesses the right to assess the moral quality of their own lives. The court has affirmed that equality requires protection against discrimination for queer individuals.

In the researcher's opinion, it is not a very good option. Still in our society marriage is considered an official validation for lovers to live together. This option may create more discrimination towards homosexual couples and people will never accept the fact that it comes under basic human rights. It may give the message to the orthodox society that they are always right in terms of their thought. The Preamble of our Constitution says "*WE, THE PEOPLE OF INDIA* having solemnly resolved to constitute India into a *SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC* and to secure to all its citizens…"[29]In a sovereign, socialist, secular, democratic country how can we discriminate against someone on their sexual orientation? If we have to give value only to the religious emotion of some people then there will be no meaning to the words of the preamble. It will not be an example of a secular democratic republic to the next generation. We should lead by example.

C. Drafting a whole new Act by considering the LGBT+ as a separate community

In the researcher's opinion, this is the most convenient and effective method for the government to enact the same-sex marriage law. The first option may create ambiguity about the rights. The second option is not a good choice in

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[26] https://pearcelegal.co.uk/blog/what-are-civil-partnerships (access on 18.03.23)
[27] https://www.equaldex.com/issue/marriage (access on 20.03.23)
[28] W.P. No. 1011 of 2022 on 17th October 2023 (SC)
[29] The Constitution of India,1949

the modern world and human rights history of India as India always advocates for human rights around the world. This option is time-saving, safe, and a step towards giving the rights of homosexual people. Authority can make a committee for drafting this right, it will help the authorities to understand the concerns of the LGBTQ+ community. Also, there is more than 50+ region around the world that already gives marriage right to homosexual couple, we can look into those laws and frame our laws according to our own culture.

VI. ISSUES RELATING TO NOT LEGALIZING SAME-SEX MARRIAGE

A. Adoption-Indian adoption law is governed by secular and religious laws. Discrimination towards homosexual people occurs due to these laws-

1) Both of these laws use the terms husband and wife which means it does not give rights to the homosexual couple and also the transgender. *Sec.5* of the Adoption Regulation Act talks about "Eligibility criteria for prospective adoptive parents". *Ss.3* of this section states that adoption should only be given to couples who have a two-year stable marriage relationship[30] which makes these acts LGBTQ+ unfriendly.

2) After the NALSA judgment a person can choose their gender or undergo surgery to change their gender. So, if after adoption any kind of transition happens then the laws stand unclear.

Another argument given by some people for not making the adoption law LGBTQ+ friendly is that the children wouldn't be able to learn the role of 'male', or 'female' considered to be 'significant' and 'normal' by our society. This argument in the researcher's opinion is very weak and lame because there are families where a biological parent can kill their child or abuse them to death. Actual "family" doesn't mean the couple should be heterosexual. Family means a place where we love care and support each other. A male person can also teach a child the value of a mother and vice versa. According to United Nations Women's Organization data in India, 13M households are headed by lone mothers who live alone with their children while another 32M lone mothers live in extended households.[31]

To bring a guardianship law inclusive of the LGBTQ+ community i.e., in compliance with the *NALSA and Navtej Singh Johar judgment*, the language of the law should go beyond the binary so that such individuals regardless of gender, the structure of the relationship, or sexual, orientation can become guardians. But essentially speaking, this will significantly depend upon how the term "best interest of the child" shall be interpreted by the court of law in the context of the LGBTQIA+ community.

In the case of *Supriyo @ Supriya Chakraborty & Abhay Dang v. Union of India,* the Chief Justice of India remarked that the Central Adoption Resources Authority's (CARA) directive, which prohibits LGBTQIA+ couples from adopting a child, is discriminatory and, according to his perspective, unconstitutional. In light of this, he suggests that members of the LGBTQIA+ community should have the ability to adopt a child.

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[30] Adoption Regulation,2017

[31] https://timesofindia.indiatimes.com/india/un-report-13-million-households-in-india-where-lone-mothers-live-alone-with-children/articleshow/69949845.cms (access on 31.07.23)

B. Surrogacy

The Surrogacy (Regulation) Act[32] makes all commercial surrogacy banned and only a "close relative" of the mother can be a surrogate mother. In my opinion, it is not a very good step because these laws make it impossible for some LGBTQ+ people to have children.

The present government argument was people killed or abandoned their children when they found that that child had some kind of abnormality. Also, poor people's exploitation was increasing because of the misuse of surrogacy. Some people even use it for human trafficking businesses. But after all these arguments, Researcher believes we can fight against it with strong legal enactment of existing criminal laws. The government just made an easy choice and also an excuse to implement their present orthodox agenda. This step just shows that government is not at all aware of LGBTQ+ community issues.

C. Inheritance laws

Inheritance and succession laws in India are governed by

I. Personal law: Hindu Succession Act,1956, Muslims and Parsi customary laws

II. Secular law: Indian Succession Act,1925

The difference between the Indian Succession Act and personal inheritance law is the right of women to property which is not similar to the men except for the Hindu Succession Act of 1956. The Indian Succession Act of 1925 provides a uniform scheme regardless of the gender of the heir and the determining factor is the nearness of the deceased.

Personal and Secular laws only give property rights to a heterosexual couple. In India, many homosexual couples live together for a long time but after their partner's death, they do not have succession rights, which seems very unfair. If same-sex marriage becomes legal government has to amend the succession law.

D. Other Issues:

Right to Health: Normally spouse has the right to make decisions for their partner when he/she is unconscious but as homosexual couples are not given the right to marry their right to health is also violated which is guaranteed under *art.21* of the Indian constitution. They also face discrimination regarding organ donation of deceased or living partners.

Finance: Unlike ordinary married couples these couples don't have the right to open a joint bank account and take a joint loan from the bank. They also can't get the benefit of the life insurance of their partner.

Concluding Observations:

The trajectory of acknowledging and embracing homosexuality in India, particularly within the realm of marriage, is characterized by a nuanced historical background, diverse cultural influences, and significant legal struggles. From the ancient marvels of Khajuraho to the intricacies of present-day legislation, this journey mirrors the evolving perspectives on human rights,

[32] The Surrogacy (Regulation) Act, 2021

individual liberties, and societal norms. In pre-colonial India, a celebration of varied gender and sexual expressions was evident, with ancient texts and art offering proof of societal acceptance. However, the British colonial era introduced a regressive legal stance, criminalizing homosexuality under *Sec. 377* of the Indian Penal Code in 1861. The post-independence period witnessed an ongoing struggle for LGBTQ+ rights, reaching a pivotal moment in the groundbreaking 2018 judgment of *Navtej Singh Johar v. Union of India*, which not only decriminalized homosexuality but also acknowledged the fundamental rights of the LGBTQ+ community.

The judicial perspective on the right to marriage in India has undergone a substantial evolution. While the Constitution doesn't explicitly recognize this right, various judgments, including those in *Justice K.S. Puttaswamy (Retd) v. Union of India* and *Shakti Vahini v. Union of India*, have broadened the understanding of the right to privacy, personal autonomy, and the freedom to choose a life partner. These constitutional principles have laid the groundwork for discussions on same-sex marriages. A global comparative analysis reveals the diversity in legal recognition of same-sex marriages. While numerous countries champion equality and inclusivity, some regions, particularly in Asia, Africa, and the Middle East, grapple with discriminatory laws and societal attitudes. Experiences from countries like the Netherlands, the United States, and Taiwan offer valuable insights into the positive impacts of legalizing same-sex marriages.

Nevertheless, the journey toward legal recognition of same-sex marriages in India encounters hurdles. The recent case of *Supriya Chakraborty & Abhay Dang v. Union of India* highlighted the court's reluctance to extend the concept of marriage to same-sex couples within existing legal frameworks, underscoring the need for specific legislative changes. A critical approach to address this issue involves exploring various options for legislative amendments. Modifying existing laws, introducing civil partnerships, or crafting a new act tailored for the LGBTQ+ community are potential avenues, each carrying its complexities and implications. Careful consideration is essential to ensure the rights of the LGBTQ+ community are protected without compromising cultural sensitivities.

Challenges surrounding adoption, surrogacy, and inheritance laws underscore the interconnected difficulties faced by the LGBTQ+ community. Reforms in these legal domains are pivotal to achieving genuine equality and recognizing the diverse family structures existing in society. In conclusion, the path to legalizing same-sex marriages in India necessitates a comprehensive approach, combining legal reforms, societal awareness, and cultural acceptance. The journey, from historical acceptance to colonial-era discrimination and the contemporary fight for LGBTQ+ rights, showcases the resilience and determination of individuals seeking justice, equality, and the freedom to love openly. As India navigates this intricate terrain, it has the opportunity to set a progressive example for the world and reaffirm its commitment to the principles of a sovereign, socialist, secular, and democratic republic.

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IMPLEMENTATION OF RIGHT TO EDUCATION ACT, 2009: ROLE OF LEGAL AID SOCIETIES IN LAW SCHOOLS IN INDIA

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Abstract: Education can be considered a normative solution to several societal problems. Universal Declaration of Human Rights in its preamble states that education is key to achieve respect for the various human rights mentioned in UDHR and freedoms by progressive measures[1]. It must be noted that RTE Act, 2009 is in compliance to Article 26 of the UDHR wherein India seeks to fulfill one of its international obligations. It is pertinent to note that every law to be effective needs proper implementation, similarly RTE Act 2009 will be said to be effective and efficient if it is properly implemented. Therefore, a ground level checking mechanism becomes important to identify the prevailing lacunas. A mechanism legitimate or legal enough through a proper channel can help bring the actual lacunas and flaws still present even after more than 12 years of coming into force of the Act of 2009. Since the primary role of legal aid societies is to act as a bridge between the law and society. It can help and aid in bridging the gap of implementation by acting as a fact finding body and suggesting solutions to ground level issues and sometimes being the solution to the problems. For example, by adopting few schools in the nearby villages and providing first hand solutions. Thus the paper shall focus on role of Legal Aid Societies of Law schools in the Country to find out the realities of Government Schools within their region specifics in a scientific manner. The scope of the paper shall be limited to norms and standards of school (section 19 to 25) mentioned under RTE Act, 2009. The research cum-fact finding can be focused on schools in rural areas.

Keywords: Right to Education, University, Legal aid society, implementation of RTE.

Introduction:

Article 39-A of the Constitution of India says, "the State shall secure the operation of the legal system to promote justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities". The provision pertaining to legal aid is broad enough to include numerous aspects pertaining to social, distributive and participative justice. Keeping the spirit of the Constitution in mind, Legal Aid Societies seek to ensure dissemination of justice equally among all sections of the society. Clinical legal education's importance lies in creating advocates for the better society and with a better understanding of challenges faced in the society at large. With this aim, Law schools should promote the culture of learning through legal aid, especially in promotion of securing human rights for the unaware and marginalized sections of the society. There lies an opportunity to fill the gap of know how created due to the prevailing inequalities in the society on various scales can be bridged by the legal aid societies of the law schools.

There are a lot of aspects that can be covered by legal aid societies to make improve lives of the individuals, such as creating awareness about the recourse to claim their basic rights of cleanliness, livelihood (under various schemes launched by government)[2], women empowerment, child health care, Right to Information, Right to Education etc.. Every single contribution will

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[1] Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[2] For example Self help groups created under Rajasthan Grameen Ajeevika Vikas Parishad (famously know as RAJEEVIKA)

make a difference in the lives of the people. However, the authors believe that out of all the Human Rights, Right to Education is the key to aware and informed society. It can be said that an educated society is a progressive society. In India Right to Free and Compulsory Education Act[3] was incorporated in the year 2009 and since then it has been much celebrated, as it aims to fix one of the major Human Rights issues. Education can be considered a normative solution to several societal problems. Universal Declaration of Human Rights[4] in its preamble states that education is key to achieve respect for the various human rights mentioned in UDHR and freedoms by progressive measures[5]. It must be noted that RTE Act, 2009 is in compliance to Article 26 of the UDHR wherein India seeks to fulfill one of its international obligations.

RTE Act 2009 has reached its teenage in 2023 however it still craves to be called an effective and efficient legislation. The implementation has been poor throughout the country at various levels. A clarity towards the actual story of implementation shall be clear only if there is a ground level checking mechanism that will identify the prevailing lacunas. Since the problems are directly lacking on the part of state governments the real flaws of implementation are not reported. Therefore a mechanism legitimate or legal enough through a proper channel can help bring the actual lacunas and flaws present even after more than 13 years of coming into force of the Act of 2009.

Here, a novice approach to study and reporting can be adopted with help of various legal aid societies. Since the primary role of legal aid societies is to act as a bridge between the law and society. It can help and aid in bridging the gap of implementation of provisions of RTE Act by acting as a fact finding body and suggesting solutions to ground level issues and sometimes, themselves being the solution to the problems.

Law schools can make a difference by physically verifying the status of schools with respect to compliance of RTE Act. The compliance can be compared and based on report cards provided by the UDISE plus. UDISE[6] is a recognized forum by the Central Government to rely upon information regarding schools pertaining to infrastructure, teachers or any other mandatory requirements as per the RTE Act. However, it has been found through a pilot survey that the information available with UDISE is not completely reliable. This claim is being made on the basis of a study completed by Legal Aid Society of National Law University, Jodhpur that concludes that the actual findings are way behind in comparison to the information available on UDISE. The lack of implementation of RTE was clearly visible. This study depicts a method to objective identification of issues and provides for solution. Authors themselves being the part of study realized the necessity of fresh empirical research on a mass scale in different parts of the country to identify the difference between what lays on paper and in reality. At the same time it is high time that the scope of legal aid societies be expanded in its form and structure. Different legal aid societies of various Law Schools are now working towards in different methods to help achieve the objective of RTE Act. However, the search made by legal aid society of National Law University, Jodhpur has not been repeated. Therefore, here we will discuss about the success story of one such issue pertaining to realization of Right to

[3] Hereinafter RTE Act
[4] Hereinafter referred as UDHR
[5] Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[6] Unified District Information system for education

Education as guaranteed in the constitution under Article 21A[7]. Thus the paper shall focus on role of Legal Aid Societies of Law schools in the Country to find out the realities of Government Schools within their region specifics in a scientific manner. The same will be a win-win situation for both the students and the schools ultimately creating a better learning experience and place. This is suggested also because undertaking legal aid activities for the benefit of the society is mandate of the Bar Council of India as part of clinical legal education further required by National Legal Services Authority as a fulfillment to directives under Article 39A of the Constitution of India[8]. Moreover, section 12 (c) of the Legal Services Authority Act, 1987 provides for legal service for women and child. Thus a a combination of clinical legal education and mandate under Legal Services Authority Act can provide a solution never tried before.

Clinical Legal Education and Legal Services Authority Act, 1987

"Clinical Legal Education is essentially a multi-disciplined, multipurpose education which can develop the human resources and idealism needed to strengthen the legal system… a lawyer, a product of such education would be able to contribute to national development and social change in a much more constructive manner."[9]

Clinical Legal Education is one way in which theory and practice can be brought together. Law students can not only contribute to the society but also learn by doing field visits and learning to ask right questions, trying to find out the right answers in an objective manner. The objective of the clinical education is radical, reformative and dynamic. Students can play a pivotal role in fulfilling the mandate provided under RTE Act. The impact of clinical legal education via empirical study on RTE Act:

(i) The students will experience the impact of law on the life of the people in terms of education.
(ii) The students will be exposed to the actual administrative and social problems and plausible solutions which will enable them to develop a sense of social responsibility in professional work.
(iii) The students will be acquainted with the documentation and lawyering process in general.
(iv) The students will consume critically the knowledge from outside traditional legal arena be equipped for better delivery of legal services.
(v) The students will develop better research skill, analytical pursuits and communicating abilities.
(vi) They will understand the limitations of the formalized legal system under RTE Act and will further appreciate the relevance and the use of legal skills.
(vii) They will imbibe humanistic and social values in relation to law and legal process while following method of objective research under the norms of professional ethics.

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[7] The focus of empirical research undertaken by legal aid society of NLU, Jodhpur
[8] Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
[9] Shweta Durge, "clinical legal education: An Overview"
[available at: Clinical Legal Education – An Overview (lawyersclubindia.com)]

(viii) They can develop best practice methods in different legal fields, especially pertaining to research.[10]

International Obligation to provide free and Compulsory Education:

It is pertinent to note that under Doha declaration, member states made a commitment to promote a culture of lawfulness. Legal Aid clinics can play a very prominent role to fill in the gap and promote understanding of human rights, justice and a culture of lawfulness. Doha declaration recognises the need for education and emphasises that education is fundamental to the prevention of crime and corruption. Member states under the Declaration made a commitment to promote access to education for all.

Right to Education in International Human Rights Law is found in soft as well as hard law. Largely states find it difficult to accept International human rights obligations and therefore bringing all or majority of the states to accept such obligations becomes a tedious task. However, some success in this area has been achieved. Wherein we see that Article 13 is the single most comprehensive provision on the right to education in international law. It is also the most textually elaborated provision of ICESCR, reflecting its importance and the expansive normative scope of the right to education. It says that[11]:

Firstly, "The States Parties to the present Covenant recognize the right of everyone to education."[12] They agreed that education should focus on fostering the complete development of human individuality and a feeling of dignity, as well as fostering a respect for basic freedoms and rights. Education should enable all people to engage fully in a free society, foster goodwill and understanding between all countries and all racial, ethnic, and religious groups, and advance United Nations efforts to keep the peace.

Secondly, "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right"[13] by making primary education compulsory and free to all; by making secondary education, including vocational and technical be made generally available to all through all appropriate means and in particular advancing the introduction of free education; by increasing the equal accessibility of higher education to all; by encouraging fundamental education for those who could not complete their primary education; by developing the system of school at all stages by introducing an adequate fellowship system and also by improving the material conditions of teachers.

Thirdly, "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

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[10] Here the focus will be on plying upon the study conducted by Legal Aid and Awareness Committee, NLU, Jodhpur as best practice.

[11] Article 13, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); available at: International Covenant on Economic, Social and Cultural Rights | OHCHR

[12] *Ibid* para 1

[13] *Ibid* para 2

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions"[14].

Fourthly, "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State"[15].

Furthermore, Article 14 makes it obligatory upon all the States Party to the said Covenant which, at the time of becoming a Party, could not secure in its metropolitan territory or other territories under its jurisdiction compulsory and free primary education, should undertake that within two years that it will work out and adopt a detailed plan of action for the progressive implementation of Article 13 and will fix a plan within a reasonable number of years to implement the principle of compulsory and free education for all. Article 2 (2) of ICESCR guarantees non-discrimination with respect to the human rights contained with the treaty. This means that Article 13 read with Article 2(2) places obligations on States parties to guarantee the right to education free from discrimination.

Thus it can be said that Article 13 of ICESCR read with its Article 14 and 2(2) mandates upon state parties to employ free and compulsory education in a time bound manner that too without any sort of discrimination.

Realities of Implementation of Section 19 to 25 and Clinical Exercises

Keeping the spirit of the Constitution in mind, the Legal Aid Society seeks to ensure dissemination of justice equally among all sections of the society. Clinical legal education's importance lies in creating advocates for the better society and with a better understanding of challenges faced in the society at large. With this aim, Law schools should promote the culture of learning through legal aid societies. In this regard it is very important to discuss a story of research conducted by the Legal Aid and Awareness Committee of National Law University, Jodhpur. This study may be taken up as best practice method to realize the dream of quality education for all irrespective of rural or metropolitan area. The ignition to do a study on such a naïve issue was the prevailing dropout rates of students from the government schools in the region of Jodhpur and elsewhere.

It must be noted that the governing regime of schooling education in India is the Right of Children to Free and Compulsory Education Act 2009. The legislation was passed in 2009 to ensure that every child below the age of 14 years gets mandatory education so as to ensure complete literacy and to strengthen the youth force of the nation. The act, apart from focussing on increasing enrolment of students in schools also tries to ensure that the Government schools get best of required infrastructural and developmental facilities to withstand the cut throat competition in the sector. For instance, the schools must have a classroom per teacher, separate toilets for boys and girls, safe drinking water, pre-determined teacher student ratio, etc. Despite all these provisions there has been a continuous decline in the enrolment of students in

[14] *Ibid* para 3
[15] *Ibid* para 4

Government Schools.[16] Even schemes such as Mid-Day Meal, Free Text Books, and Free Education have failed to stop the drain of students to private institutions leaving aside the hopes of increasing enrolments.

Study by – National Law University, Jodhpur: "Right to Education – Realities Unveiled"

The Research on Implementation of RTE Act was conducted in 110 judiciously selected schools in Jodhpur district. In order to find out whether the RTE norms are being complied with, the members of the Committee visited 110 schools in 11 blocks of Jodhpur district with the objective of collecting data to identify the roadblocks in implementation of RTE and to suggest possible remedies to eliminate the hindrances. 10 Schools from each block based on the markings provided by UDISE; wherein 5 schools that secured score of less than 5; and 5 schools that secured score of more than 5 were selected.

This being an empirical research, it was very important to prepare a rationale on which the selection of schools, preparation of questionnaires and compilation of information would be based. Thus a simple method for selection was drawn up. A website called school report cards has a unique feature under which it has very logically arranged the data of around 1.5 million government schools in India. On the website, every district is first divided into blocks, with each block divided into clusters. Each cluster has different number of schools with different grades. Out of the total clusters, the cluster which had the highest variation in the school grades was selected for the purposes of the study.

Findings of the Study conducted by NLU, Jodhpur on following parameters[17]

1. Acute Shortage of Staff: Almost every school visited by the teams was witnessing acute shortage of staff. Majority of schools were not having any support, clerical or cleanliness staff, while some (18 of 79 Primary and Upper Primary Schools) had poor Teacher Pupil Ratio. Thus teachers were helplessly burdened with completing piles of documents, cleaning premises, maintaining records, etc. This fact is accompanied by another crucial situation that a single teacher had to take all the classes in various schools. In around 65% of schools (60 of 92) multiple classes were conducted together. Which means a fifth class student was being taught the same subject of same level along with a 1st standard student.
2. Infrastructure: A major factor which distinguishes an institution from others is the standard of its infrastructural facilities. Private schools are believed to fetch more students because of their attractive infrastructure and allied facilities. Therefore to provide a comfortable environment to the students of government schools, the RTE act prescribes some minimum infrastructural facilities for every school to have. These include, inter alia, availability of safe drinking water, separate toilets for boys and girls, a usable playground. A total of 59 schools (Around 59.60%) which had no mode of safe drinking water. What they had was an untidy and filthy tank fed by either rain water or with a commercial water tanker, which according to the teachers was paid

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16 http://indianexpress.com/article/education/student-enrolment-in-govt-elementary-schools-decreased-in-2013- 14-irani

17 The empirical study was conducted under the supervision of author as a faculty member of legal aid and awareness committee, NLU Jodhpur.

for by them only. Students either brought water from home or had to strive for healthy clean water. Around 77% of the schools visited (74 of 96) had uncovered toilets with no toilet seat. Whereas another 78.88% schools had toilets with doors, 67.60% of these (i.e. 48 of 71 where there were doors) had their door locked for the students. For various reasons, as per the school authorities, the toilets were not being used and hence had to be locked. Now the most surprising part is that only 18% schools had clean open (uncovered) toilets and another 18% had clean covered toilets. There was no arrangement for hand wash in 72 of 96 schools visited (75%). Student either washed hands from the little water available in school or used sand to rub their hands. There were around 42% schools (38 of 92) where classes were conducted outside the classrooms. The reason being either no electricity or the roof leaking heavily during rains or the classrooms were being used as kitchen or storeroom, etc. Talking about the playground and sports equipment made mandatory under the RTE act, we found that 18 schools did not even have playgrounds. Another half of the schools (52) had a playground but that was only usable to keep students away from playing or for cattle to graze. This is because the playgrounds were not levelled and were full of thorny bushes and gravels and stones making them entirely unfit for being used as playgrounds. Every school receives certain fund for getting sports equipment, but 46% of schools (43 of 93) had no sports material for the students to play.

Abovementioned is just a glimpse of findings by Legal Aid and Awareness Committee of NLU Jodhpur. A school specific detail of the non-implementation of RTE Act is an eye opener for everyone.

Clinical Legal Education and Implementation of Section 19 to 25 of RTE as an Obligation under Human Rights Law:

The study conducted by LAAC, NLU Jodhpur can be considered as a best practice method to work as a fact finding mechanism with respect to finding realities of implementation of RTE Act. The Law students carry the requisite knowledge and skill to undertake task of such nature wherein they can look at the theoretical aspects and find its non-implementation. The study shows the impeccable nature of undertaking empirical search and research. These rural areas can be the place of their clinics and students can bring their theoretical knowledge of constitutional law, international law and Right to education into practice. Their knowledge of law makes them more sensitized as compared to any other social science student and since they are also aware of the recourse falling within the system, makes them the best choice to conduct this study in a legitimate manner. Undertaking of such task by law students also displays legitimacy to the research. Such a skilled and knowledgeable human resource should not be wasted rather put to use in societal benefit.

Section 8 and 9 of the RTE Act highlights the requirement of infrastructure, however, the act doesn't elaborate on the standard and the specifics of infrastructure. Even though it can be reasonable expected that school infrastructure would provide basic facilities such as clean classrooms with benches, gated premises, playground and its equipment, writing boards, and at the very least clean drinking water and toilets separately for boys and girls. It can be seen in the report prepared by NLU Jodhpur, how the requirements of basic infrastructure have been ignored. Lack of logistics creates hindrance in education; we may depict as many exceptional success stories of

how hard working people succeed even in the dearth of resources but that doesn't wither away the responsibility of the state to fulfil its duties under the RTE Act and International Obligations.

Section 19 to 25 details mainly about forming an SMC (School Management Committee) formed jointly, including teachers, parents of students and village/area representatives. The task of SMC is to undertake meetings for holistic progress and development of the school including the implementation of the RTE Act. However, the same was also found lacking in majority of the schools in the pilot study conducted by NLU, Jodhpur.

This just is a minute depiction of what can be found if study is done on a large scale taking help from different legal aid societies from all parts of the country. The idea is not to find the lacunas only but to identify specific issues to suggest specific implementation and solutions. India is so diverse that sometimes a localized solution can work in a better manner as compared to one size fits for all. Almost all states have either National Law Schools or Law Colleges offering 5 year or 3 year courses and both can be engaged to work for the implementation of RTE Act.

Concluding Observations:

The overall purpose of the paper stands on the notion of using law students in a beneficial interest of the society. Through the abovementioned exercise of fact finding it can be deduced that collection of data through objective means and method can also help provide objective solutions. In general such a skilled human resource is difficult to be found wherein Law Schools under the guidance of their faculty members can achieve the requisite targets of collecting data and submitting to the authorities. There are number of news items that display utter negligence of authorities to comply with RTE and to not to go too far, the schools of national capital itself are in non-compliance to RTE, especially section 19 to 25. PILs over such non-compliance are now becoming usual and the authorities wait for court order to comply with RTE. It is submitted that state governments can use such a vast knowledgeable set of people, train them in terms of methodology to build the gap between the provider and the receiver. The students of law school can fill in the gap that arose due to shortage of staff or otherwise. Doing this will not only help the society and the state machinery but will also provide exposure to the students. It will give them a whole lot of practical experience and awareness about the realities of the society which will equip them better to work and serve the nation keeping in mind the realities of society and state and requirements of society and state. Therefore I reiterate that it is a win-win scenario for everyone. An additional activity that may be undertaken is adoption of schools by the legal aid societies and by doing so, the society will push to eradicate the problems faced by the schools. It may not be too many but may begin by adopting a single school near the University/College of the legal aid society. Tremendous changes can be made by the students of legal aid societies while working in collaboration with the school teachers and authorities.

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CAPITAL PUNISHMENT AND MERCY CLEMENCY IN INDIA

Shambhu Kumar*

Abstract: The constitutional framework in India provides that a convict after being awarded the death penalty, may, after exhausting certain judicial remedies, approach the President or the Governor of a State, to exercise their power of clemency to grant pardons and reprieves. The courts in India have chosen to rule in favour of the convicted persons whose mercy petitions have been rejected by the President by commuting their death sentences, on the ground that there has been a delay in rejection of their clemency petition. This paper argues that the courts cannot intervene solely on the ground of unexplained delay by the intervention must be based on some additional 'supervening circumstances'.
Keywords: Death penalty, clemency, mercy petition, inordinate delay, supervening circumstances.

Introduction:

The Death penalty is a punitive measure, where the life of a person is taken by the State by following the due procedure of law. Whenever a person commits a crime that is grave enough, in the eyes of judiciary that he/she does not deserve to live anymore is hanged to death. In India, death penalty under Indian Penal Code is approved for murder, gang robbery with murder, abetting the suicide of a child or insane person, rape, waging war against the government and abetting mutiny by a member of the armed forces. Death sentence is also prescribed under some anti-terror laws for those convicted of terrorist activities. There are countries which abolished Capital Punishment. There are countries which did not. India is one among the countries where the death penalty exists, but now only for the "rarest of rare case[1]". Let's see in this article, the major issues and news related to capital punishment and judiciary.

Mercy petition has been one of the most debated and stressed topics in the arena of law and justice at domestic and international levels. Be it the House of Commons or a convention of the United Nations Human Rights Commission, the discussions on the said topic are never-ending. This article would be dealing with the Indian point of view covering all the relevant points at both domestic and international levels in an attempt to bring light to the illuminated brains of the State. At a time when most of the countries have already abolished the death penalty or are under a moratorium, India is on the verge of seeking reform on Mercy petition as well as capital punishment.

Mercy petition and Capital punishment cohabitate each other or it can be said that the need for knocking the doors of the President arises only after the convict has been sentenced to the death penalty. Although we have celebrated 73rd Independence Day recently, still there are a plethora of hurdles in the path of the correct applicability of mercy petition and capital punishment. The decades' long delay and inefficiency in deciding the clemency cases seem to be the most lamenting part of the executive. The debilitating effects of this complex phenomenon imposed upon the prisoners that can be only called a living death are far beyond the maximum suffering permitted by Article 21. As per the data revealed by the 262nd report of the Law Commission, 140 countries have

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1.Bachan Singh v. state of Punjab, AIR 1980 SC 898

already abolished the death penalty. In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the UN General Assembly draft resolution seeking to ban the death penalty. The power to pardon and exercise mercy towards prisoners was historically a power exercised by the Sovereign, perhaps emerging from notions of divinity of kings. Along with the power to declare war and make peace, the power to adjudicate disputes and to grant mercy to offenders has long been an essential component of sovereignty[2]

With respect to capital cases the IPC and CrPC granted clemency powers in capital cases to the local governments and the Governor General in Council equally. Mercy petitions were thus first decided by the local government and upon rejection, were sent to the Centre.[3] As the Government's 'rules of business' allowed for the delegation of such powers, at the central level mercy petitions were effectively disposed of in the Home Department without even a reference to the Viceroy.[4]

Independence and the Constituent Assembly Debates:

Although the Colonial Government avoided the use of the royal prerogative clemency power, this became unavoidable after Independence as the discretionary powers of the Governor-General was removed. Now the only power available to the Governor General to deal with mercy petitions from the provinces was the prerogative power which was delegated to him under Instruction III of the Royal Commission appointing Lord Mountbatten as Governor General of India.[5] The source of the power may have changed but decision making remained in the control of the Governor General in his individual capacity although now it was 'presumed that the Governor General, in the exercise of these powers, will be guided by the advice of the Minister for Law and Minister of Home Affairs.[6]In the meanwhile, discussions on the nature of the mercy provisions in the forthcoming Constitution were also taking place in the Constituent Assembly. In response to the questionnaire on the salient features

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2.For references to the large amount of literature on the subject, see David Tait, Pardons in perspective: The role of forgiveness in criminal justice at http://www.canberra.edu.au/ncf/events/pardonsperspective.pdf (last accessed 31 March 2009)

3.In the case of Chief Commissioner's provinces (the precursor the modern day union territories), the Central Government acted as the Provincial Government.

4.The Governor General of India was empowered to make rules for the more convenient transaction of business in his Council and any order made or act done in accordance with such rules should be deemed to be the order or act of the Governor General in Council. The Viceroy Lord Northbrook however made a change in the rules and required that all mercy petitions be sent to the Governor General for disposal as he was under the impression that the prerogative of mercy vested in the Viceroy personally. This practice however ended with his departure in 1876 although the rules were amended to their previous form only in 1889. Note by HA Adamson, 4 May 1907, File no. Home (Judicial) 373/23.

5.In virtue of omission of Section 295(1) of the Govt of India Act, 1935 under the India (Provisional Constitution) Order, 1947, the concurrent statutory powers exercised by the Governor General in this discretion will no longer exist. Section 402A of the Criminal Procedure Code also becomes nugatory'. Minute by AV Raman, Additional Secretary, HomeDept dated 29 August 1947 in File no. Home (Public—B) 67/3/47.

6.Minute by AV Raman, Additional Secretary, HomeDept dated 29 August 1947, File no. Home (Public—B), 67/3/47.

of the Constitution circulated by BN Rau, the Constitutional Advisor to the President in March 1947, Dr. Shyama Prasad Mookerjee referred to the President's power 'to pardon and to commute or remit punishment.[7] Another member of the Union Committee, KT Shah, sent a note with general directives effectively a draft constitution. This included 'pardon convicted criminals' as part of the powers of the Head of the State in Clause 15. However curiously the memorandum and draft clauses circulated by BN Rau on 30 May 1947 made no specific mention of the mercy powers of the President.[8] After a few meetings of the Union Constitution committee, however, broad powers of mercy (pardon, remission and commutation) were included in the recommendations of the Committee on the Principles of the Union Constitution on 4th July 1947.[9]

When the matter came up for discussion in the Constituent Assembly on 31 July 1947, there was lengthy discussion on how such powers should be exercised in the proposed 'federal' Indian state. This was largely brought about by concerns of the rulers of the Indian [princely/native] States who did not wish to lose their 'sovereign' powers of mercy in the new federal India although they did not object to concurrent powers. The discussions in the assembly on 31 July 1947 about protecting the rights of the rulers of princely states seemed far removed when the mercy provisions of the Draft Constitution came up for discussion in the assembly on 29 December 1948. One suggested amendment even attempted to remove the concurrent powers of mercy in death cases provided to the Governors and Rulers thus giving the President sole powers of mercy over all the states.[10]This was however opposed by Dr. Ambedkar who noted that the proposed provision was similar to present practice where both Governors and the Governor-General had mercy powers in capital cases.

Article 59 was approved and added to the Constitution, as was the corresponding Article 141. These were renumbered as Article 72 and Article 161 in the Draft Constitution as Revised in November 1949 and remained the same on 26 November 1949 when the Constitution was finally adopted by the Constituent Assembly. With the coming into force of the Constitution of India on 26th January 1949 and the change of the mercy procedure, new 'instructions' for submission of the mercy petitions were also prepared and sent to all the states.[11]

Constitutionality of Death Penalty:

Death penalty has been a mode of punishment from time immemorial which is practiced for the elimination of criminals and is used as the

7. B Shiva Rao et al. (ed.), The Framing of India's Constitution—Select Documents, Volume II, Indian Institute of Public Administration, New Delhi: 1968
8. B Shiva Rao et al, The Framing of India's Constitution—A Study, Indian Institute of Public Administration, New Delhi: 1968, at 368
9. Clause 7 of Part IV, 'Functions of the President'. The recommendations did however note that such powers of commutation or remission could also be conferred by law on other authorities since this was already the case with the IPC/ CrPC.
10. Debates of the Constituent Assembly of India—Volume VII, http:// parliamentofindia.nic.in/ls/debates/vol7p28.htm (last accessed 31 March 2009)
11. Letter number 23/1/49—Judicial, dated 14 March 1950 from EC Gaynor, DS MHA to All Chief Secretaries to Governments of Part A and Part B States and all Chief Commissioners (for Part C states) (except Chief Commissioner Andaman and Nicobar Islands

punishment for the heinous crimes. Indian Criminal jurisprudence is based on a combination of deterrent and reformative theories of punishment. While the punishments are to be imposed to create deter amongst the offenders, the offenders are also to be given opportunity for reformation. There has been a diverse opinion regarding the death penalty in India as some are in the favour of the retention of the punishment while others are in the favour of its abolishment. India is one of the 78 retentionist countries which have retained death penalty on the ground that it will be awarded only in the 'rarest of rare cases' and for 'special reasons'. Though what constitutes a 'rarest of rare case' or 'special reasons' has not been answered either by the legislature or by the Supreme Court.[12]

The constitution of India guarantees to every person a fundamental right to life subject to its deprivation by the procedure established by law[13], it has been argued by abolitionists that sentence of death in the present form violates the citizen's right to life. There are numerous legal luminaries who argue that the very fact that the death penalty is retained in Indian criminal statutes runs counter to one's right to life. It is submitted that these learned jurists probably overlook the fact that even right to life is not an absolute right. Further Art. 14 of Constitution declare "equality before law and equal protection of the laws", which means that no person shall be discriminated against unless the discrimination is required to achieve equality[14]. The concept of equality incorporated in Art. 14 finds echo in the preamble to the constitution. Capital sentence, it seems, is therefore, an anti-thesis of one's right to life. However, it is an indisputable fact that there is nothing in the Constitution of India which expressly holds capital punishment as unconstitutional.

The constitutional validity of the death penalty was challenged from time to time in numerous cases.

In *Jagmohan Singh v. State of Uttar Pradesh*[15], the five judge bench of the Supreme Court, by a unanimous verdict, upheld the constitutional validity of death penalty held that capital punishment was not violative of Articles 14, 19 and 21 and . In this case the validity of death sentence was challenged on the ground that it was violative of Articles 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Cr. P.C. was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of death sentence is done in accordance with the procedure established by law. It was observed that the judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial.

In another case *Rajendra Prasad v. State of UP*[16], Justice Krishna Iyer empathetically stressed that death penalty is violative of articles 14, 19 and 21. He further said that to impose death penalty the two things must be required-

(1) The special reason should be recorded for imposing death penalty in a case.

12. Articles 21 of the Constitution.
13. Articles 21 of the Constitution.
14. Articles 14,15& 16.
15. Jagmohan Singh v. State of Uttar Pradesh, A.I.R. 1973, S.C 947.
16. Rajendra Prasad v. State of Punjab, A.I.R. 1979, S.C.p.916.

(2) The death penalty must be imposed only in extraordinary circumstances.

The question was again considered in *Bachan Singh v. State of Punjab*[17] in which by a majority of 4 to 1 (BhagwatiJ.dissenting) the five judge bench of the Supreme Court overruled its earlier decision in Rajendra Prasad. It expressed the view that death penalty, as an alternative punishment for murder is not unreasonable and hence not violative of articles 14, 19 and 21 of the Constitution of India, because the "public order" contemplated by clauses (2) to (4) of Article 19 is different from "law and order" and also enunciated the principle of awarding death penalty only in the 'rarest of rare cases'. Bhagwati J. in his dissenting judgment observed that "death penalty is not only unconstitutional being violative of Articles 14 and 21 but also undesirable from several points of view."

Further, The Supreme Court in *Machhi Singh v. State of Punjab*[18] laid down the broad outlines of the circumstances when death sentence should be imposed. Justice Thakkar speaking for the Court held that five categories of cases may be regarded as rarest of rare cases deserving extreme penalty. They are:

> *Firstly:* Manner of Commission of murder – When the murder is committed in an extremely brutal manner so as to arouse intense and extreme indignation in the community, for instance, when the house of the victim is set a flame to roast him alive, when the body is cut to pieces or the victim is subjected to inhuman torture.
> *Secondly:* Motive – When the murder is committed for a motive which evinces depravity and meanness eg. a hired assassin, a cold blooded murder to inherit property, or gain control over property of a ward, or a murder committed for betrayal of the motherland.
> *Thirdly:* Anti-social or socially abhorrent nature of the crime where a scheduled caste or minority community person is murdered in circumstances which arouse: social wrath; or bride burning for dowry, or for remarriage.
> *Fourthly:* Magnitude of the Crime, Crimes of enormous proportion, like multiple murders of a family or persons of a particular caste, community or locality.
> *Fifthly:* Personality of victim of murder

In *Deena v. Union*[19] of India the constitutional validity of section354 (5) I.P.C. 1973 was challenged on the ground that by rope as prescribed by this section was barbarous, inhuman and degrading and therefore violative of Art. 21. The court held that section 354 (5) of the I.P.C., which prescribed hanging as mode of execution as fair, just and reasonable procedure within the meaning of Art- 21 and hence is constitutional.

In *Sher Singh v. State of Punjab* Chandrachud[20]C.J. expressing the view of the three judges of The SC held that death sentence is constitutionally valid and permissible within the constraints of the rule in Bachan Singh. This has to be accepted as the law of the land.

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17. Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898
18. Machhi Singh v. State of Punjab, A.I.R. 1983, S.C 957.
19. Deena v. Union of India, (1983)4 SSC 645
20. Sher Singh v. State of Punjab, A.I.R. 1983 S.C 365.

Similarly, In *Triveniben v. State of Gujarat*[21], the Supreme Court asserted affirmatively that the constitution does not prohibit death penalty.

In *Mithu v. State of Punjab*[22] Sec.303 of the IPC was struck down as violative of Article 21 and 14 of the Constitution of India, as the offence under the section was punishable only with capital punishment and did not give the judiciary the power to exercise its discretion and thus result in an unfair, unjust and unreasonable procedure depriving a person of his life.

Thus, to sum up, it is clearly evident from a study of the above cited case laws that death penalty is regarded as constitutional in India, despite several legislative attempts to abolish the death penalty in India have failed, and it is to this day prevalent in India as is evident from the recent case of Ajmal Amir Kasab, who was executed in 2012.

International Scenario:

The international landscape regarding the death penalty, both in terms of international law and state practice, has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the categories Abolitionist for all crimes, Abolitionist for ordinary crimes, Abolitionist de facto, Retentionist**.**

The erosion of capital punishment at the state and county level continued in 2020, led by Colorado's abolition of the death penalty. Two more states Louisiana and Utah reached ten years with no executions. With those actions, more than two-thirds of the United States (34 states) have now either abolished capital punishment (22 states) or not carried out an execution in at least ten years (another 12 states). The year's executions were geographically isolated, with just five states, four of them in the South, performing any executions this year. The Gallup poll found public support for the death penalty near a half-century low, with opposition at its highest level since the 1960s. Local voters, particularly in urban centers and college towns, rejected mass incarceration and harsh punishments, electing new anti-death-penalty district attorneys in counties constituting 12% of the current U.S. death-row population.

In 2020, Colorado became the 22nd state to abolish the death penalty, while Louisiana and Utah each reached 10 years with no executions. As a consequence, more than two-thirds of the country – 34 states – have either abolished capital punishment or have not carried out an execution in more than a decade. Oklahoma, the state that has carried out the third-most executions in the modern era, marked five years since its last execution. Legislative and judicial actions in California**,** North Carolina**,** Ohio, and Virginia also signaled the withering of capital punishment, even in high-use states[23].

Capital Punishment in International Human Rights Treaties:

1. The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of death penalty in international

21. Triveniben v. State of Gujarat, A.I.R. 1989 S.C 142
22. Mithu v. State of Punjab, (1983)2 SSC 277
23.https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report

human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty[24] .

2. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories[25].

Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC[26] .

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies[27] .

In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment[28].

Delay and the Death Penalty:

Delay has been a matter of concern in the criminal justice system, with the adage 'justice delayed is justice denied' being attributed to the plight of both victims of crime as well as the accused. Long terms of incarceration, periods of which are on death row and in solitary confinement, have been the concerns of courts through the years. In the case of *T.V. Vatheeswaran v. State of Tamil Nadu*[29] the Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21. However, in *Sher Singh v. State of Punjab*[30], it was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death.

A Constitution Bench of the Supreme Court in the case of *Triveniben v. State of Gujarat*[31] considered the question, and held that only executive delay, and not judicial delay, may be considered as relevant in an Article 21 challenge. The Court said, "the only delay which would be material for consideration will be

24. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39
25. Ibid. p.43
26. Ibid. pp.43-44
27. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45
28. Ibid. pp.45-46
29. (1983) 2 SCC 68.
30. (1983) 2 SCC 344
31. (1989) 1 SCC 678.

the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive[32]."

Recently, the Supreme Court also upheld the constitutionality of Section 364A, IPC, which allows for the imposition of the death sentence in cases of kidnapping with ransom. In the case of *Vikram Singh v. Union of India*[33], it had been argued that Section 364Awas unconstitutional, among other things, because it denied courts the discretion of awarding a punishment that was not life imprisonment or the death sentence especially in cases of kidnapping which may not warrant such a high punishment. The Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed".

Nature, Purpose and Scope of Clemency Powers:

The State and Central Governments have powers to commute death sentences after their final judicial confirmation. This power, unlike judicial power, is of the widest amplitude and not circumscribed, except that its exercise must be bona fide. Issues often alien and irrelevant to legal adjudication morality, ethics, public good, and policy considerations are intrinsically germane to the exercise of clemency powers. These powers exist because in appropriate cases the strict requirements of law need to be tempered and departed from to reach a truly just outcome in its widest sense.

Clemency powers of either pardoning an offender or reducing or altering the punishment awarded[34], have their provenance in similar powers, which, since time immemorial, have vested in the sovereign. However, their exercise today, in modern democratic states, is not, as it was of yore, a private act of grace, but one of solemn constitutional responsibility[35].

Clemency powers in India are enshrined in the Constitution. Article 72 vests these powers in the President, and Article 161 vests similar powers in the Governors of the States. Neither of these powers are personal to the holders of the office, but are to be exercised (under Articles 74 and 163 respectively) on the aid and advice of the Council of Ministers.

Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence, which was not placed before the courts.[36] The Ministry of Home Affairs, Government of India, has drafted the "Procedure Regarding Petitions for Mercy in Death Sentence Cases" to guide State

32. Triveniben v. State of Gujarat, (1989) 1 SCC 678, at para 17
33. VikramSingh Vicky&Anr. v. Union of India &Ors, Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015.
34. For the meaning of pardon, reprieve, respite, etc, see State (Govt. of NCT of Delhi) v. Prem Raj, (2003) 7 SCC 121, at para 10.
35. EpuruSudhakar v. Govt. of A.P., (2006) 8 SCC 161, at para 16-17
36. Keharsinghv.UOI(1989) 1 SCC 204.

Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners. These rules were summarized by the Supreme Court in *Shatrughan Chauhan v. Union of India*[37].

Concluding Observations:

Conclusively it is significant to understand the outcome of the above discussion wherein the courts have endeavored to stress on the importance of timely disposal of the mercy petitions by the executive. The power of clemency must be exercised with reasonableness and judiciously and within a reasonable frame of time. The power to grant pardon rests with the executive and it is ultimately the exercise of the power in a just manner that will determine public approval. This is not to say that delay will always lead to commutation of the death sentence. The power to commute death sentence is not a codified power but, it is in the exercise of the supervening powers of the court to do complete justice under Art. 142. Consequently, looking at only the impact of delay on the prisoner 'alone' is not in the interests of justice. The courts have to be aware of their role and functionality under the Indian Constitution and take care not to overstep the designated areas assigned to them. In their zeal to play a humanitarian role, they cannot usurp the power and role of other organs[38].

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37. (2014) 3 SCC 1.

38. To understand the limits of the exercise of the power of judicial review, see ShrutiBedi, 'The Power of Judicial Review: Judicial Chutzpah or Judicial Desideratum' in S. Khurshid, S. Luthra, L. Malik & S. Bedi Judicial Review: Process, Powers and Problems (Cambridge University Press, 2020) 285-288.

SOLID WASTE MANAGEMENT RULES, 2016 & THE ROLE OF WOMEN

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Abstract: Our Prime Minister has launched 'Swachh Bharat Mission' program on the occasion of Gandhi Jayanti in the year 2014, with a motive to make our country clean and aesthetic. After the year 2019 this mission has special focus on solid waste management. This mission provides special opportunities to women. In this article author examined the participation of women in solid waste management in the light of women's empowerment and constitutional goal of equality.
Keywords: Solid Waste Management, Collection, segregation, women ragpickers.

Introduction:

Our Constitution is a progressive document reflecting the struggles of freedom fighters of our country, including that of the father of Nation. The great freedom fighter Mahatma Gandhi was also of the view that women are gifted by god to conserve what they use. Gandhiji had seen how Kasturba and other females in his ashram kept the place clean and cooked food for his disciples. He appreciated the work of women and gave them equal status *vis a vis* men.[1] He said that women constitute about half of the human population, and was concerned about emancipation and empowerment. He remarked that women should not be considered subordinate to men but are of equal status and possessing equal mental abilities. Therefore the woman should be encouraged to participate in all the activities of the society. She has the same right to freedom and liberty that a man has. Thus, it can be observed that Gandhiji was far ahead of his times in empowering the women. When the issue of women's empowerment comes before us today, we understand that women must be given equal opportunities to grow themselves and bloom to their full potential. Gandhiji brought the women out of the bounds of their homes and motivated them to participate in the freedom struggle. Women like Anne Besant, Mira Ben, Abha Ben, Bhikaji Cama were given full freedom to decide the course of freedom struggle. In the constituent assembly debates also, women like Hansa Mehta advocated for the right of women.

The Constitution and Women's Participation:

Our Constitution put the women at par with men.[2] There are many provisions in our constitution which provides number of opportunity to women. It also makes special laws for the benefit of women. All over the world, our constitution was hailed as symbol of progressive document. Moreover, the concept of 'justice' would not be achieved if women would not be given equal rights to that of men. The word 'justice' in our Preamble meets these expectations, when not only social justice but also political and economic justice are given to women. The objective of the Constitution is enumerated in

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[1] T N Khoshoo and John S Moolakkattu, *Mahatma Gandhi and the Environment* 3,9 (TERI Press,7th reprint, 2019).

[2] Constitution of India, Art. 14, right to equality.

Preamble, which ensures justice, equality, and freedom to be achieved. These objectives can be achieved with the provisions of FR and DPSP.

Our basic law has substantially detailed frameworks which grants equality between men and women. This not only gives the right to equality to all individuals under Art.14, but also makes room for affirmative action and affirmative discrimination, in later articles. This basic law ensures equality in front of law under Art. 14. When the same rights are granted to men and women, it prevents unfair treatment of individuals. It stated as "The State must not deny to any citizen equality before the law or the equal protection of the laws within the territory of India."

Starting from Art. 15 of our basic law, women are given special treatment in the subsequent provisions.[3] Our basic law in clause 1 and 2 of Art. 15 opposes the gender based discrimination but in subsequent clause it provides scope for discrimination for the benefit of women. The State can make special provisions to improve the social condition of women and provide political, economic and social justice. It will help to achieve the target of women empowerment. The main reason to give special provision in our basic law is that our societal structure placed her at disadvantage position in struggle for subsistence.[4]

Similarly, Art. 16, clause 1 and clause 2 explain that women will get equal opportunity in employment.[5] These provisions are in addition to the principle of equality before law and to achieve the objective of Preamble as equality of status and opportunity. The gist of these provisions is that women should be treated at par with men in providing employment opportunities. It has been ensure by our basic law that women shall have equal right in social, political, and economical decision making as men. They are made capable so that they can avail opportunities without limitations and restrictions.

The Art. 243 T of the Basic Law, 1950 provides that in every municipality 1/3 of the total number of municipal seats must be reserved for the women. Such seats must be filled by the direct election in every municipality.[6]

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[3]*Supra* note 2, Art. 15 of the Constitution specifically prohibits discrimination on the basis of sex. The Clause (1) of Article 15 provides that, "the State must not discriminate against any citizen on grounds only of: (a) religion, (b) race, (c) caste, (d) sex, (e) place of birth or any of them." And Clause (2) of it says that , "No citizen shall on grounds only of : (a) religion, (b) race , (c) caste, (d) sex, (e) place of birth, or any of them be subject to any (a) disability, (b) liability, (c) restriction or (d) condition with regard to: (1) Access to shops, public places; or (2) use of wells and places of public resort maintain wholly or partly by state funds or dedicated to the use of the general public." Article 15, Clause 3 constitutes exception to Article 15 Clause 1 and 2. It authorises the State to make special provisions for women and children.

[4]*Muller* v. *Oregon*, 52 L.Ed.551. 208 U.S.412,28S.Ct. 324 (1908).

[5]State shall provide equal opportunities for all citizens in matter relating to employment appointment to any office under the State. There shall be no discrimination on the grounds of religion, race, caste, sex and place of birth, residence or any of them in providing employment.

[6]*Supra* note 2 Art. 243T: Reservation of seats:1. Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total

Solid Waste Management Rules, 2016:

The SWM rules have categorised the solid wastes in different forms: (1) solid (2) semi solid domestic waste (3) commercial waste (4) sanitary waste (5) catering and market waste (6) institutional waste (7) silt waste (8) dairy waste (9) agriculture waste (10) street sweeping waste (11) treated biomedical waste. The SWM Rules has been decentralised. It imposes duties on individual waste generators and waste generators organised in the form of RWAs /market association/Institutions/ Hotels/ Restaurants/ Gated Communities. To further implement the concept of decentralisation, user fee/ service charge has been introduced in the Rules. For the first time, the 2016 rules have imposed a duty on manufacturers/brand owners of disposable products/sanitary napkins/diapers. The most important duty is to generate awareness among the masses for proper wrapping and disposal of such products.[7] Further, they are also duty bound to provide a wrapper/ pouch for disposal of such diaper/ sanitary napkin at the time of sale.[8]In addition, such manufacturers would be duty bound to put in place a mechanism to take back the packaging waste from the buyers. Lastly, such manufacturers would have to provide 'necessary financial assistance' to local authorities for setting up of waste management system.[9] Thus, it can be observed that the new rules contain provision by which local authorities can generate funds for solid waste treatment.

Solid Waste and Women Participation:

Management of solid waste requires various levels of works. It requires going to every household, taking of waste from each household, separation of collected garbage, treatment and transfer to landfill. This various stages of work required employment. Women are suitable to take part in all these activities required in the management of SW process. This sector provides strength to women. Therefore, women empowerment is done by increasing women participation in solving problem of solid waste. The relationship between women and solid waste is multifaceted and involves various aspects of waste management, environment impact, and social dynamics. Here are some key points to consider:

1. Waste Segregation and Collection: Women often play a crucial role in waste segregation at the household level. Many municipalities in India promote the segregation of waste into biodegradable and non-biodegradable categories. Women may be involved in collecting and sorting household waste.

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number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality;2. Not less than one third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes;3.Not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

[7]*Id.* at Rule 17(4).

[8]*Id.* at Rule 17(3).

[9]*Supra* note 113 at Rule 17(1).

2. Community Engagement and Awareness: Women are frequently involved in community-level awareness campaigns related to solid waste management. This includes educating communities about the importance of waste segregation, proper disposal, and recycling. Women's participation in these initiatives is essential for creating behavioral change.
3. Employment Opportunities: Solid waste management can offer employment opportunities for women, particularly in roles such as waste picking, sorting, and recycling. In some areas, women are actively involved in informal waste management activities.
4. Government Programs: The Swachh Bharat Abhiyan, launched in 2014, is a flagship program in India that encompasses solid waste management. The campaign emphasizes community participation and awareness, and women are often involved in the implementation of cleanliness and waste management activities.
5. Self-Help Groups (SHGs): Women-led Self-Help Groups (SHGs) have been involved in waste management initiatives. These groups may engage in door-to-door waste collection, segregation, and recycling activities, contributing to both environmental sustainability and women's economic empowerment.
6. Waste-to-Wealth Initiatives: Some initiatives focus on turning waste into a resource. Women may be involved in projects that convert certain types of waste into useful products, contributing to sustainable development and income generation.

In terms of rules and regulations, the Solid Waste Management Rules, 2016, is a crucial policy framework in India, These rules lay down guidelines for waste segregation, collection, transportation, processing and disposal. They also emphasize the concept of Extended Producer Responsibility (EPR), placing some responsibility on producers for the environmentally sound management of the products and packaging they introduce into the market.

Role of Women in Solid Waste Management in Delhi:

Municipal Solid Waste in Delhi comprises significant portions from households. In India, the households are generally managed by women. If women start managing the generation, segregation and disposal of domestic waste properly, it may be a great contributing factor in efficient solid waste management in the country. Not only domestic household, women are participating in the work force and various other sectors in India. At the work places, women have an important role in the management of solid waste. Many women have become champions in successfully implementing business model in waste management. Apart from it, poor women are also engaged in earning their livelihood from waste segregation and recycling business.

More than 60% women in India remain in the households. They do not go anywhere to perform office work or any employment. According to the National Sample Survey Organization (NSSO) data, 64% women in urban area are involved in managing household duties.[10]It means that the households are

[10]Mahendra Singh, '64% of urban women busy with housework, study reveals', *The Times of India*, New Delhi, 13 October 2014. *Available at*

dominated by women and if properly sensitized about the need of keeping the cities clean, they can contribute significantly in the minimization of the waste generation, segregation and disposal. It has been shown in research studies that most of the women do not know about the Solid Waste Management Rules, 2016.[11]

As far as Delhi is concerned, the picture is not better. According to Shiney Chakraborty, a prominent columnist, Delhi's women workforce participation rate has always remained below the national average.[12] Thus, Delhi's women who manage the households have even a greater role in cities' waste management plans and implementations. However, it should not be misunderstood that only women are duty bound in the households to segregate and dispose the waste properly. All the members in the family, whether large or small, have equal responsibilities. In a research study, it has been found that bigger the size of the family, lesser the chances of segregation at the household level.[13]

Secondly, those women who go out of their households for jobs, for learning, and for eking out their livelihoods have also a great potential to improve the clean and waste free environment in their surroundings. Although 16% women go out for jobs, but almost all women go for learning outside their homes. If they are also properly sensitized, they would minimize generation of waste. Most of these women do not know about the Solid Waste Management Rules, 2016 and so they do not about responsibility of segregation at source and minimization of waste.[14] If properly made aware, they would promote segregation and prudent disposal of solid waste too. They may also start using alternatives of single use plastic, disposable products, composting of wet waste from their households, and disposing of diapers and menstrual waste. In today's times,

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https://timesofindia.indiatimes.com/india/64-of-urban-Indian-women-busy-with-housework-study-reveals/articleshow/44796358.cms. (last visited on December 30, 2022).

[11]Shivani Wadehra & Arabinda Mishra, 'Managing Waste at Household Level: Field Evidence from Delhi', *Final Report submitted to International Growth Centre*, 12 (October 2017), *available at* https://www.theigc.org/wp-content/uploads/2017/10/Wadehra-et-al-Final-report_cover.pdf. (last visited on December 30, 2022).

[12]Shiney Chakraborty, 'Why are so few Delhi women participating in the workforce?' , *The Wire*, September 07, 2019. *Available at* https://thewire.in/labour/why-are-so-few-delhi-women-participating-in-the-workforce. (last visited on December 30, 2022).

[13]Shivani Wadehra, & Arabinda Mishra, 'Encouraging Urban Households to Segregate the Waste they Generate: Insights from a Field Experiment in Delhi, India', 134 *Resources, Conservation, and Recycling* 239-247 (2018).

[14]Shivani Wadehra & Arabinda Mishra, 'Managing Waste at Household Level: Field Evidence from Delhi', *Final Report submitted to International Growth Centre*, 12 (October 2017), *available at* https://www.theigc.org/wp-content/uploads/2017/10/Wadehra-et-al-Final-report_cover.pdf. (last visited on December 30, 2022).

menstrual waste has become a big issue in solid waste dynamics of the city.[15] Women can help the society if they decide to properly dispose menstrual waste and diapers. They must be made aware about the long-term consequences of using sanitary pads and diapers. In different cities of our country, such awareness programs started very late.

In fact, the entire kick-start was made specifically in the field of solid waste was by Ms. Almitra Patel of Bangalore city. She has been crusading for the better legal, regulatory, and institutional regime in the field of solid waste management in India after graduating in engineering discipline from the prestigious Massachusetts Institute of Technology (MIT) in the United States of America. An engineer turned social activist, she has been engaged in various committees constituted by the Supreme Court and with many other organizations working in the field of solid waste. In fact, Bangalore city boasts of renowned solid waste management gurus, such as Almitra Patel, Kalpana Kar (an Oxford graduate), Kavita Reddy, gynecologist Dr Meenakshi Barath, stockbroker turned activist Sandhya Narayan, Vani Murthy and lot others.[16]

Women led Self Help Group in Solid Waste Management:

Ambikapur Municipal Corporation is a good example of women empowerment where the menace of SW is solved with the help of women only. This city has been declared as India's best city in 'Innovation and Best Practice' in waste management in *Swachha Survesksha*n in year 2017. Ambikapur is a small city in Sarjuga district in Chhattisgarh with a population of 1.45 lakhs. This city generates 45 metric tonnes of solid waste per day[17]. This town managed its all garbage produced successfully with the help of women. This service is provided by Women's Self Help Group, which is also called Green Warriors. Their work has set an example in the SBM. These women not only make city waste free but at the same time generate livelihood for themselves through improved methods of separation of garbage and ability to use a product in different form. More than 0.4 K women work in the city for making it clean. These women work in a systematic way. They divide themselves into small groups of 10 members to cover around 0.3 K houses of the city. And each small group is assigned to one of the 18 SLRM Centres. Generally the nearest Solid Liquid Management Centre is allotted to the small group, so that it is easy to transfer the waste for further treatment. The collected waste is then segregates into two categories, biodegradable and non-biodegradable. Further, the biodegradable and non-biodegradable wastes divided into 17 and 20 categories

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[15]Menstrual pads are non-biodegradable waste. They take around 500 years to decompose. The growing use of diapers and pads normally land up in landfills. See, Anisha Bhatia, 'An Urgent Challenge: Why India Needs to Tackle Its Menstrual Waste', *NDTV*, New Delhi, February 28, 2018, *available at* https://swachhindia.ndtv.com/urgent-challenge-india-needs-tackle-menstrual-waste-6665/. (last visited on January 03, 2023).

[16]K.V. Aditya Bharadwaj, 'Why Waste Management is Dominated by Women?', *The Hindu*, Bengaluru, March 8, 2017, available at https://www.thehindu.com/news/cities/bangalore/why-waste-management-is-dominated-by-women/article17424243.ece (last visited on January 03, 2023).

[17]Waste Away, Ambikapur shows the way, a*vailable at* https://www.indiawaterportal.org/articles/waste-away-ambikapur-shows- the way.(last visited on March 3, 2023).

respectively at the facility centre. The collected biodegradable garbage are sent for decomposition process. Whereas, non-biodegradable collected wastes are further separated into different small units. This segregated non-biodegradable waste is cleaned and then send to the tertiary segregation centre. A user charge is also imposed on the residents for managing operations and maintenance of the centre. By using above process Ambikapur women not only make the city clean but also empower themselves.

There is another example of women empowerment in solid waste management is 'Kudumbshree'[18], which worked with Kerala Government. The Solid Waste Management is also a huge problem in Kerala too. Kerala government starts the Suchitwa Mission and in this mission Kudumbashree is actively involved in solving the problem of solid waste. After receiving training from Self Help Group, these women went to the area where the actual work starts. They are assigned with different groups. And each group is assigned at different location. They collect waste from the location they have assigned. For collecting waste, they use different tools, such as gloves and trolley. They collected waste from the location; then it dispose of into the various waste bins of municipality. The waste bins are situated at different locations. This group deposits its waste in the municipality waste bin. From that waste bins, the municipality people collected the waste materials, and then they treat it as needful.

Women had taken a lead in the city of Pune to improve the solid waste scenario. The University of Pune (Savitribai Phule University) had taken an initiative to integrate women rag pickers and recyclers into the formal solid waste collection and disposal system. It developed collaboration with SNDT University of Mumbai to achieve this task of integration.[19]

Women Ragpickers:

Most importantly, those women who are engaged in recycling network, rag picking etc. play a pivotal role in city's solid waste management. Some women are engaged in collection of old apparels, utensils in exchange for cash. These women contribute to solve the city's waste problem by collecting and buying recyclable materials from doorstep of the households. These women are not as poor as the rag-pickers. Girls are engaged in rag-picking from various *dhalaos*, landfills and *kuredaans* of Delhi. According to a research work, most of the girls engaged in rag-picking work did not complete school education. Although majority of these girls stay with their parents, their relationship with

[18] Kudumbashree is one of the largest women empowering projects in the country and is a model for implementing various poverty implementing programmes at the local self-government level in Kerala. It is formally registered as the "State Poverty Eradication Mission" a society registered under the Travancore Kochi Literary, Scientific and Charitable Societies Act 1955.

[19]Ranjit Gadgil & Sanskriti Menon, 'Solid Waste Management and Women's Livelihoods in Pune: A Desired Future', Report submitted to 3D Program for Girls and Women and Centre for Environment Education, September 2018, *available at:-* https://the3dprogram.org/content/uploads/2018/10/3D-Program-SWM-Report-September-2018.pdf (last visited on January 03, 2023).

them is not sweet.[20]These children are subject to sexual exploitation, physical and mental abuse by their employers and guardians. It has been noticed that these girls are from socially disadvantaged strata of society. There is an urgent need of integration of these informal sector women rag-pickers into formal system of solid waste management of the city. It would empower the poor women and provide a feeling of belongingness to the city.

Concluding Observations:

To effectively manage solid waste in India, the role of ragpickers and women cannot be overlooked. On the role of women it can be concluded that 84% women in Delhi are unemployed and most of them do not know about the new rules on segregation at source and minimization of waste. If trained and integrated properly into the formal system, women can help in the greater compliance of MSW Rules. There is a need for more awareness on disposal and treatment of household waste, menstrual waste and sanitary diapers.

[20]PreetiSoni, Problem and Situation of Girl Ragpickers in National Capital Territory of Delhi',2 *JADD,* 267(2014).

COVID 19 AND THE SURGE OF DOMESTIC VIOLENCE: AN ANALYSIS

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Satyanand**

Abstract: The concept of domestic violence has been in existence since dawn of human civilization, it is most pernicious gendered ailment of human society. However, currently the societies around the world have witnessed the surge in number of cases of domestic violence during the pandemic covid 19. Additionally pandemic lockdown has affected the humanity in various ways and resulted in extreme consequences for the domestic violence victims. The paper focuses on the aspect that how the concept of 'home (the safe heaven)' has turned into the confined torture house, where they often face abuse like physical, psychological, sexual, economical nature. Domestic violence not only impact the victims instead it leaves negative psychological impact on the kids and youngster in the family. Through this paper an attempt has been made to study through example, various reason for the increase in domestic violence cases in India and around the world. Additionally, the paper also discusses the various measures administrative and legal taken at different levels to tackle this human right issue. The challenges have been faced by the section of society all over the world whether developing or developed.
Keywords: Covid 19 pandemic, Domestic Violence (DV), IPV (Intimate Partner Violence), Abusive behaviour, NCW.

Introduction:

COVID-19 (a new stumbling block to humanity) has been announced a worldwide pandemic. The course of action declared over ongoing months to handle the problems has seen individuals' mundane life radically adjusted. However, these changes are essential to beat coronavirus and protect health system be that as it may, however, yield, negative results. Since the virus keeps on spreading over the world, it carries with it numerous new burdens, including physical and mental wellness in danger, confinement & dejection, the shutdown of numerous schools, organizations, financial powerlessness, and unemployment. Through all the, children and their mother are particularly vulnerable (end violence against children, 2020)[1]. Domestic violence elucidates the scope of abuse taking place within the four walls of safe heaven known as HOME. In wider term it incorporates intimate partner violence (IPV), a type of ill-treatment executed by a partner either current or ex. In this article, we bring to notice a former concept of "domestic violence" since this term is most native to media and politics across the world. It is also imperative to explain that we are for the most part alluding to IPV (intimate partner violence) and its effect on youngsters who trapped to IPV between grown-ups. We likewise centre principally on ladies, since they are lopsidedly hit by abusive behaviour at home (DV); notwithstanding, we perceive that residential maltreatment (DV) happens with men & inside same sex relationship. In this this article, we have analysed the rising worry with regards to whether aggressive behaviour at home (DV) rates

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[1] The pandemic paradox: The consequences of COVID-19 on domestic violence - PMC (nih.gov)(last visited on August 20,2020)

would increase because of the "lockdown" mandated by numerous nations in the world. Despite the fact these measures change, somewhat, in their planning and seriousness, they for the most part necessitate that individuals remain at home and just leave for basic requirements, for example, purchasing food, gathering medicine, or completing a key worker job.

The obligatory confinement enforced on account of COVID-19 would nurture the abusive behaviour at home (DV). Residential maltreatment (DV) is being accounted for everywhere throughout the world, for example, China, Australia, UK, France, Germany Turkey, South Africa, USA, Malaysia, Lebanon, and Argentina, etc. It is also assumed that confinement mandated worldwide would witness the surge in violence and decimate the concept of human right and women empowerment.

Intimate Terrorism:

Being restricted to home on account of coronavirus is arduous for everybody, except, when it turns into a nightmare for particular section of the society based on gender discrimination. Family savagery means to undermine or other brutal practices inside the household that might be physical, carnal, mental, monetary, etc. also leads to kid ill-treatment and brutality. Family viciousness during pandemics is related to a scope of components including monetary pressure, expanded vulnerability to exploitative relations, and diminished alternatives for help. The social disconnection because of lockdown imposed over the world to help control the expansion of Coronavirus, individuals struck in unpredictable circumstances of household savagery are confined within the walls. Seclusion from the community exacerbates individual conditions and aggregate vulnerabilities while restricting open and recognizable help alternatives. In various nations, including Australia, there have been expansion in need of DV administrations and reports of expanded hazard for kids not going to class[2] an example like past scenes of social isolation-related with pestilences and pandemics[3]. In Australia, as stay home directions are implemented, the police recorded the fall in crime by 40% at certain places. But there is also an increase in DV call-outs[4]. Simultaneously a report released by Google recorded a 75% rise on the net relating to help for DV. This example is rehashed globally. Reports of DV and family brutality have raised all over the globe over since community detachment and quarantine concept has been followed by the people, and lockdown being imposed by the government. As of late, recounted proof from the developed countries like Brazil, China, the United States, and Australia shows a rise in viciousness to kids & ladies because of detachment and isolation. China, the main country to implement mass isolation in the province of Wuhan, released DV cases rise triple in February 2020 contrasted with the earlier year. As Europe implemented to isolate gauges with an action to decrease the effect and spread of disease, the Italian government started evacuating hotels and other such places to provide shelter to increasing

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[2] https://www.abc.net.au/news/2020-03-27/coronavirus-domestic-family-violence-covid-19-surge/12096988 (last visited on 27 march 2020)

[3]https://theconversation.com/cabin-fever-australia-must-prepare-for-the-social-and-psychological-impacts-of-a-coronavirus-lockdown-133353 March 13,2020)

[4]https://www.abc.net.au/news/2020-04-08/coronavirus-shutdown-sees-crime-rate-drop-in-wa/12132410 (April 8,2020)

no. of abusive individuals[5]. Likewise, France announced a 36% expansion in DV cases due to the execution of measures of quarantine as well as self-isolation. France likewise started authorizing hotels as safe houses for those escaping abusive circumstances. As isolate measures stretched out to a single state of the US, published a report after isolation measures are effected in the country, there is a comparable rise in DV cases running from 21% to 35%. Similarly, The Crime Survey for England and Wales showed that 1.6 million women and 757,000 men had experienced domestic abuse between March 2019 and March 2020, with a 7% growth in police recorded domestic abuse crimes.[6]

Crossing of Laxman Rekha:

Home is not a protected walls with family abuse and cruelty for youngster and female population, however it can concluded that most physical, sexual, and mental violence happens within that safe area. The basic reason behind this is that only a home is a place where elements of abuse can be contorted and undercut by the individuals who do violence, regularly without any investigation from outside within the family. In the COVID-19 emergency, the admonishment to "remain at home" along these lines has significant ramifications for those grown-ups and youngsters previously residing with somebody those who are abusive and controlling. Rigid limitations on movement have shut off roads, trains, airplanes, or in India as it is known as crossing Laxman Rekha has created another trouble in seeking help for these sufferers. A prohibitive course of action has also additionally created a way to the scheme of individuals who do violence through strategies of dominance, observation, & pressure. These situations arise mostly because what goes in inside individuals' homes and, fundamentally, inside their family alone and personal relations occur in secret and out of the view, from a normal perspective, of others. Accidentally, lockdown steps may subsequently give individuals who abuse a more noteworthy opportunity to act without investigation or outcome. Accepted practices and mentalities that recommend there is sacredness for family life to home, in a social concept as opposed to physical sense can likewise make it hard for individuals to stand up against, not to mention leave, injurious circumstances because of sentiments of disgrace and humiliation. During the COVID-19 emergency, it is along these lines essential to ponder glorified portrayals of home and family and to make it workable for individuals to discuss, and where conceivable move to contra wise violence and dominating family life. Questioning people straightforwardly about rehashed events, about if they reliably feel safe and secure at home is one method of doing this; in any case, it is likewise significant that individuals posing these inquiries would have the opportunity and enthuse assets for turning into the subtle ways which individual are terrified off.

Hazardous Impact:

In the UK, around 2 ladies were killed each week by their partner. During Coronavirus pandemic, reports have developed of an evident growth in residential murder in various influential nations. March 2020, In Spain country

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[5]‘ France is putting domestic abuse victims in hotels during coronavirus lockdown’ – ACCORD(March 31, 2020)

[6] Domestic abuse and Covid-19: A year into the pandemic (parliament.uk)(last visited on May 28, 2021)

especially hit hard by the pandemic, reported its 1st DV victim after 5 days of lockdown in the country[7]; a lady was killed by her husband in the presence of their kid in the city of Valencia. There is also additionally rising proof of multiplied no. of family murder in the UK since these lockdown limitations were imposed. At the beginning period of the pandemic, it is too soon to confirm whether the discovery of death rate speaks to a genuine ascent in domiciliary death rates and increased media consideration. Nonetheless, it's an imperative feature that detailed cases are of brutality.

The expanded danger to ladies and kids was an anticipated symptom of the coronavirus lockdowns. Increased violence is an example in numerous crises, regardless of whether strife, financial emergency, in the course of disease outbreaks, even though isolation rules create crucial trouble. It occurs in all emergency circumstances, what we stress over is similarly as paces of abuse are increasing, the availability of administrations, and the capacity of ladies to get to these administrations will diminish. This is a genuine test. In numerous nations, there have been calls for law or policy changes to show the expanded hazard to woman and kids in the isolation.

Viciousness Across World:

The arrangement for wellbeing and in war against the pandemic has prompted another deterrent of brutality over the world for which it is important to modify social practices more than ever and for the government to adjust profoundly the degree which can mediate in our personal lives and practice. These measures have been taken because the voices and needs of fatality from time to time are unnoticed and are under-represented in certain pieces of the media and inside the strategy of the political circle. Through this research, the issues have been raised because there are activities that may assist with moderating extra dangers that coronavirus, & its orderly community and monetary impacts, adversely affect the victims. NGO & government are making a move presently for ensuring and supporting an administration that gives emergency and needful help to survivors. In any case, it is likewise where monitoring and, conceivable, connectivity with the individuals who might be victim by abusive behaviour at home (DV) that can bolster each other, regardless of whether by their own or through expert. The present pandemic makes contradiction in respect of remaining safe at home and more vulnerable to domestic abuses.

Nations all over the globe have urged everyone for handling this dreadful condition by isolating oneself at home, however, this confinement has opened doors for other dreadful conditions for particular sections of society.

Specialist family viciousness and sexual brutality administrations, NGOs, communities, and government organizations are cooperating to give data and administrations. Family brutality and sexual viciousness administrations are

[7] Women killed in Spain as coronavirus lockdown sees rise in domestic violence | Domestic violence | The Guardian, (April 28,2020)

basic administrations and will stay accessible at Alert, regardless of whether administrations is provided in various manners[8].

The United Nations on Sunday approached for an earnest activity to battle the overall increase in aggressive behaviour at home (DV). "I ask all legislatures to put ladies' wellbeing first as mostly they are double sufferers in the pandemic," Antonio Guterres, The Secretary-General posted on Twitter.

In crises, Spain has shown increased no. aggressive behaviour at home (DV) got more18% in the initial 14 days of lockdown in comparison to a similar period a month sooner and expanded to 47% during the lockdown period.

The French police detention across the country spike of around 30% percent in abusive behaviour at home (DV)[9]. Christophe Castaner, the French minister, said he had requested that officials be watching out for abuse. "The chance increments because of confinement," he said in a meeting on French TV.

Involvement with New Zealand and universally has demonstrated that family abuse (counting intimate accomplice viciousness abuse, and violence) and sexual brutality can heighten throughout and later huge scope debacles or emergencies. The current COVID-19 pandemic likewise brings explicit dangers. Self-isolation can mean the danger of increasingly extreme brutality from an accomplice, relative, or other family unit part. Victims may likewise encounter difficulties in interfacing with steady individuals or getting to help in regular manners.

After the spouse assaults her better half, the wife called the police. At the point when police showed up, in any case, they just archived the assault, at that point made no further move. At that point, the spouse recruits a legal counsellor and petitions for legal separation just to find that the scourge had removed that road of the break, as well. Her separation continuing delays until court procedures begin. She will have to sit for the court's choice. Furthermore, finding another home during the episode is troublesome, spouse to keep on living with her abuser for weeks. It is an example happening around the world. Institutions that shield ladies from abusive behaviour at home, are feeble and underfunded in any case, they are also presently stressing to react for the expanded interest.

Indian State Affair:

Not only in the current scenario but since 90s India has seen inequality from the time of LPG (Liberalization, Privatization, and Globalization) at this moment is again confronting the deplorable effect due to coronavirus. Being a part of the world we never miss to follow a similar example, so we experience a similar aftereffect of the pandemic in addition the aggressive behaviour at home (DV). The confrontation of the first featured issue in quite a while given by the NCW (National Commission of Women) in April, which recommended a 100% growth in aggressive behaviour at home (DV) during the lockdown. Jagori a,

[8]https://nzfvc.org.nz/COVID-19/preventing-responding-violence-COVID-19 (April 30,2021)

[9] Domestic violence cases jump 30% during lockdown in France Euronews (March 28, 2020)

delhi based NGO, which runs helplines foe women victims of violence has in fact experienced a 50% drops in call.[10]For instance, the Delhi Commission of Women (DCW) saw an abatement in calls identified with abusive behaviour at home (DV). One of the main reasons behind the decline of phone calls is depicted through this example- a lady and her adolescent child from a prior marriage confronted the burn, because of the dissatisfaction of the 2nd spouse over not getting liquor due to lockdown. She contacted the police, helped to furnish her with an authority helpline no. However, the trouble for the lady increased to a larger extent when the spouse learned the complaint against him[11]. Activists accept that the measurements may not uncover the genuine degree of the issue, as ladies need space and time to connect with helplines or specialists. They likewise site to the way that grumblings received by NCW are through messages, WhatsApp, etc. to which larger part of females in India face inconvenience and don't get access to. Additionally, the NCW has not gotten any grievance through the post during the lockdown. It's about the numbers as well as the mental and social effects that this curfew has composed on the female population.

No Escape from Impeccable Storm:

While social confinement is a powerful tool for disease control, it can prompt social, monetary, and mental results, however the negative aftereffect; are stress and gender-based abuse. The intimidating strategy, these domestic abusers make use of to control their partner & children "bear an uncanny resemblance" prisoners & abusive system who use to break the system political, democratic structure[12].

The techniques which empower one individual to control another are culprits of sorted out diplomatic or sexual abuse may teach each other in coercive strategies, culprits of household violence seem to re-examine them. Notwithstanding physical brutality, which is absent in each damaging relationship, regular devices of misuse incorporate seclusion from companions, family and work; consistent observation; severe, nitty-gritty standards for conduct; and limitations on taking necessities items such as food, apparel, and offices. Detachment from home, anyway indispensable to the battle against this pandemic, is providing more capacity to the abusers. On the off chance that unexpectedly individuals must be at home, that gives him a chance, out of nowhere, to make major decisions around that. To state she ought to do or ought not to. The segregation has additionally broken encouraging help groups, making it unmistakably amplifying hardship for the victims to find support or escape. Since the pandemic & brutality is acting like hand in gloves so there is by all accounts no way of a break anyway notwithstanding this Isolation matched with mental and financial stressors going with the pandemic just as potential increments in negative ways of dealing with stress (for example exorbitant liquor utilization) can meet up in an ideal tempest to trigger a phenomenal influx of family brutality. So as in this lockdown all the public places are shut, which concludes that individuals are consuming more liquor

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[10] Covid-19 lockdown | Rise in domestic violence, police apathy: NCW - The Hindu April 2,2020

[11] https://www.deccanherald.com/specials/insight/coronavirus-crisis-no-lockdown-for-domestic-violence-829941.html (April26, 2020)

[12] How Domestic Abuse Has Risen Worldwide Since Coronavirus - The New York Times (nytimes.com)(June 25,2021)

inside the wall of their homes. Substance abuse, money related strain, and isolation are all well-known domestic violence hazard factors[13]. During isolation, there are additionally less open doors for individuals residing with family brutality to ask for help from outside homes. The UN organization for sexual and conceptive wellbeing (UNFPA) has evaluated that there would be 31 million additional instances of abusive behaviour at home (DV) worldwide if lockdown proceeds for increasingly a half year[14].

Different Approaches:

The footprint of policy to deal with this problem has been created by the government of different countries. Complaint by the victims are is not easy task therefore the officials have attempted to solve every aspect related these abuses-

Government Measures-Governments have thought of better approaches to handle abusive behaviour at home in the hours of limitation forced because of lockdowns throughout the covid19 pandemic.

- Italy has propelled an application permitting the request for help without making the call[15].
- The government of French has also propelled an activity to help sufferer by new hotlines and a site for sources, alongside actualizing code words to reveal to Pharmacy staff[16].
- In Australia a Department of Communities to work with the police power has created covid19 family and domestic violence tasks to guarantee the smooth functioning of administrations. They have also permitted courts to force electronic observing on guilty parties and have raised punishment sums[17].
- NCW in India has launched a WhatsApp number to tackle the present situation. This would permit ladies to get in touch with them for help identified with abusive behaviour at home (DV) through messages. One in every six complaints during the curfew has been made through this WhatsApp no.[18]

Administrative measures-It is significant for national reaction intends to organize support for ladies by actualizing estimates that have demonstrated to be compelling. These include[19] :

- Integrating avoidance endeavours and administrations to react to violence against ladies into COVID-19 reaction plans;
- Designating aggressive behaviour at home (DV) asylums as fundamental administrations and expanding sources to them, and civil society bunches on the forefront of reaction;

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[13]https://www.dashriskchecklist.co.uk / September 28,2020)

[14]https://www.thehindu.com/news/international/coronavirus-lockdown-surge-in-domestic-violence-says-who/article31529111.ece May 07, 2020

[15]https://www.nbcnews.com/news/world/european-countries-develop-new-ways-tackle-domestic-violence-during-coronavirus-n1174301(April 3,2020),

[16]https://english.alarabiya.net/en/features/2020/04/06/Coronavirus-Jordanian-woman-s-pleas-for-help-highlight-global-rise-of-domestic-abuse.html April 6, 2020),

[17] https://www.abc.net.au/news//coronavirus-family-and-domestic-violence-fears-grow/12136652 April 9, 2020)

[18]https://www.aljazeera.com/news/2020/04/locked-abusers-india-domestic-violence-surge-200415092014621.html (18 April 2020),

[19]https://www.un.org/sites/un2.un.org/files/policy_brief_on_covid_impact_on_women_9_apr_2020_updated.pdf (9 April 2020),

- Expanding the limit of shelters for victims of viciousness by re-purposing different spaces, for example, void inns, or instruction foundations, to suit isolate needs, and incorporating contemplations of openness for all; Designating safe spaces for ladies where they can report violence without alarming culprits, for example in markets or pharmacies;
- Moving administrations on the web;
- Stepping up support and mindfulness battles, including focusing on men at home.

It is significant for national reactions to incorporate explicit correspondences to the open that equity and the standard of law aren't suspended during times of confinement or lockdown. Gender-based viciousness anticipation procedures should be coordinated into operational plans of the equity and security areas for the emergency and legal time limits on offenses, especially sexual brutality offenses, ought to be suspended.

Concluding Observations:

Inevitably, the lockdowns will end. Yet, as the containment delays, the peril appears to probably increase. Studies show that abusers are bound to harm their accomplices and others due to lost positions or major budgetary misfortunes. The dreadfulness and vulnerability related to pandemics give an empowering situation to the abusers that may worsen or start different types of brutality. Confined in dwelling places, the ladies are put in a circumstance where it is difficult to seek help or support from the external world. Presentation and open door for misuse increments as there is nobody to intercede to secure ladies. Abusers are exploiting connection gauges and mishandling their forces. The women are deprived of even the fundamentals rights. The situation for all the classes of women is suffering in one or other ways.

We on the path of civilized society, and no civilised people force the women and children in the chamber of torture. Deconstructing the patriarchal system and gender imbalance at a residential place and in public places is perhaps, the most essential aspect to create a better world. Reinstitution of the rights and proprietary for everyone is important. The social, economic, and political improvement of women will be helpful in the long run. There is an urgent need to put Lockdown on gender stereotypical prejudiced notions of patriarchal society and must be locked inside the box in isolation forever. Now talking about India's condition nearly half-billion women are at peril in the country due to the pandemic. The measurements have been taken by the government to tackle the problem. However, whatever has developed is the struggle &endeavours are being backtracked in India in an attempt to tackle covid19 crises as the government is not prioritizing woman’s apprehension. The situation for all the classes of women suffering in different ways, Some are being denied and deprived of their basic rights and the other is being curfewed in their homes with the abusers without any support or services provided and made accessible to them. Therefore, the country requires to provide violence extensive plan to address all the facts of violence against women in the largest democratic country.

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